SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 804

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF B. COLES NEIDECKER

No. 805

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF GEORGE W. NEIDECKER

No. 806

LEWIS J. VALENTINE, POLICE COMMISSIONER OF THE CITY OF NEW YORK, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA ON THE RELATION OF AUBREY NEIDECKER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

STATEMENT UNDER RULE

This appeal is made on behalf of the relators in three separate proceedings for writs of habeas corpus instituted [fol. 2] in the United States District Court, for the Southern District of New York. Because of the identical nature of the three proceedings and of the issues involved, the appeals have been consolidated into one record upon consent of the attorney for the relator and the attorneys for

the respondent in each proceeding, and by order of this Court.

Each of the relators herein applied by duly verified petition for a writ of habeas corpus, and a writ of habeas corpus was issued in each proceeding on July 26, 1935.

In each proceeding the respondent filed a return to the writ of habeas corpus on or about July 26, 1935. A traverse to the return was filed in each proceeding on or about August 12, 1935.

A hearing in the three proceedings was had before the Hon. Johnson J. Hayes, D. J., on August 12, 1935.

Following a joint decision on August 19, 1935, an order was made and entered in each proceeding on August 21, 1935, dismissing the writ of habeas corpus.

By order in each proceeding entered August 28, 1935 the relator's application for leave to appeal was allowed by Hon. Robert P. Patterson, D. J.

The relator in each proceeding is represented by Frederic R. Coudert, Jr., Esq., and the respondents in each proceeding are represented by Davis, Polk, Wardwell, Gardiner and Reed.

There has been no change of parties or attorneys since the commencement of the within proceedings.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

PETITION FOR WRIT OF HABEAS CORPUS (B. COLES NEIDECKER)

To the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York:

B. Coles Neidecker, your petitioner, respectfully shows:

(1) Your petitioner is unlawfully imprisoned and deprived of his liberty without his consent by Lewis J. Valentine, Police Commissioner of the City of New York, and some agent or subordinate of the said Police Commissioner, or other person whom he designates by the fictitious name of "John Doe"; said captor's real name being unknown to the petitioner.

(2) Under color of United States Statutes and the Extradition Treaty between the United States and the Republic of France of January 6, 1909 providing for the return to the said Republic of France from the United States of fugitives from justice of the former, petitioner is now unjustly deprived of his liberty and imprisoned in the Tombs, charged with a crime within the said Extradition Treaty.

(3) Said detention and imprisonment is unlawful and improper, and without legal warrant or authority, because:

(a) Your petitioner is a native born citizen of the United States;

[fol. 4] (b) Article V of the said Extradition Treaty between the United States and the Republic of France of January 6, 1909, which is the only Extradition Treaty bearing upon the subject in existence between the two nations, provides as follows:

"Article V. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

(c) That by reason of the existence of the said provision in the only Treaty of Extradition in existence between the United States and the Republic of France, the President of the United States has no constitutional power or authority to surrender a citizen of the United States to the said Republic of France.

(d) That the complaint, under cover of which your petitioner is held, does not charge any extraditable offense under the provisions of the said Treaty of 1909, concluded between the United States and the Republic of France, were said Treaty of binding effect.

(e) Your petitioner is not guilty of any extraditable offense under the provisions of said Treaty of 1909, were said Treaty of binding effect.

(f) All proceedings had, or attempted to be had before the authorities of the State of New York under the said complaint and warrant are illegal, void and without authority in law because the said authorities did not have jurisdiction over the person of this petitioner.

(4) No previous or other application has been made for this or similar relief.

[fol. 5] Wherefore, petitioner prays that Your Honor will grant a writ of habeas corpus, directed to the Honorable Lewis J. Valentine, Police Commissioner of the City of New York and to the Warden of the Tombs Prison, in the City of New York, and to any and all person or persons having your petitioner in custody, requiring him and them to produce before Your Honor immediately the body of your petitioner, together with the alleged grounds of his said detainment and imprisonment, that the legality and propriety of his confinement and detention may be inquired into according to law.

Dated July 26, 1935.

B. Coles Neidecker, Petitioner. Frederic R. Coudert, Jr., Attorney for Petitioner.

(Verified by B. Coles Neidecker this 26th day of July, 1935.)

[fol. 6] PETITION FOR WRIT OF HABEAS CORPUS (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

PETITION FOR WRIT OF HABEAS CORPUS (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 7] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS (B. COLES NEIDECKER)

President of the United States of America to Lewis J. Valentine and "John Doe" or any other person having the custody of B. Coles Neidecker, Greeting:

We command you that you have the body of B. Coles Neidecker by you imprisoned and detained as it is said together with the time and cause of said imprisonment and detention, by whatever name the said B. Coles Neidecker is

called or charged, before Honorable Francis J. Caffey, or one of the other Judges of the United States District Court for the Southern District of New York, at the United States Court Rooms or Post Office Building, Borough of Manhattan, City of New York, in Room 235, on the 26th day of July, 1935, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness, Honorable Francis G. Caffey, United States District Judge for the Southern District of New York, this 26th day of July, 1935.

By the Court.

Charles Weiser, Clerk. Frederic R. Coudert, Jr., Attorney for Relator, 2 Rector Street, Borough of Manhattan, New York City.

Let the foregoing writ issue.

Francis G. Caffey, Judge of the United States District Court for the Southern District of New York.

[fol. 8] Writ of Habeas Corpus (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

Writ of Habeas Corpus (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 9] In United States District Court

Return to Writ of Habeas Corpus (B. Coles Neidecker)

To the Honorable Francis G. Caffey, United States District Judge:

In obedience to the within Writ of Habeas Corpus I herewith produce the body of B. Coles Neidecker, and for cause

of his detention show that said B. Colcs Neidecker is held in custody pursuant to a warrant of the Honorable Garrett W. Cotter, United States Commissioner, true copy of which is annexed hereto.

Dated New York, N. Y., July 26, 1935.

Edward T. V. Fitzgerald, Detective 1 Grade #689, Police Dept., City of N. Y.

[fol. 10] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Extradition of BERTRAND COLES NEIDECKER, Aubrey Neidecker, and George William Neidecker, Fugitives from the Justice of the French Republic

COMPLAINT ON EXTRADITION

To the Honorable Judges of said Court:

Your complainant, Pierre Moeneclaey, having first been duly sworn deposes and says:

1. I am the acting Consul General of the French Republic in the City of New York, and in this matter I act for and on behalf of the Government of the French Republic.

2. I have received a cable from the Ministry of Foreign Affairs of the French Republic in Paris, sent in the diplomatic code, a translation of the text of which is as follows:

"July 24, 1935. By cable I requested on July 23rd, the Embassy [French Embassy in Washington] to ask the American Government to arrest provisionally with a view to ultimate extradition the three Neidecker brothers, ac-[fol. 11] cused of fraud and breach of trust (abus de confiance) and larceny and obtaining property by false pretenses (escroquerie) by Prosecuting Attorney for the Department of the Seine. Kindly confirm to the American authorities the petition for extradition of the French Government. There exists a warrant of arrest which will be forwarded with legal evidence as promptly as possible."

3. Upon information and belief, the three Neidecker brothers (Bertrand Coles, Aubrey and George William)

were and are bankers and officers of the Travelers Bank of Paris, France.

4. Upon information and belief, the Travelers Bank has been closed, and a warrant or warrants have been issued in France for the arrest of Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker for the crimes of fraud and breach of trust (abus de confiance) and larceny and obtaining money, valuable securities or other property by false pretenses (escroquerie), and upon information and belief the amount of money or the value of the property which the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are charged with having misappropriated is more than $200 or 1,000 francs.

5. I am informed and believe that Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker have fled outside the boundaries of the Republic of France, that warrants for their arrest cannot be served in France, [fol. 12] and that said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker have sought an asylum within the jurisdiction of the United States and may be found in the State of New York and City of New York, and in the Southern District of New York.

6. The crimes which the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are charged to have committed in the French Republic are among the offences enumerated in the Treaty existing between the United States and the French Republic signed January 9, 1909, proclaimed July 26, 1911, and more particularly referred to in Article II, Sections 7 and 8 of said Treaty, copies of the English and French texts of which are as follows:

"7. Fraud or breach of trust by a bailee, banker, agent, factor, executor, administrator, guardian, trustee or other person acting in a fiduciary capacity, or director or member or officer of any company, when such act is made criminal by the laws of both countries, and the amount of money or the value of the property misappropriated is not less than two hundred dollars, or one thousand francs.

Embezzlement by public officers or depositaries; Embezzlement by persons hired or salaried, to the detriment of their employers.

8. Larceny; obtaining money, valuable securities or other property by false pretenses, when such act is made criminal by the laws of both countries, and the amount of money of the value of the property fraudulently obtained is not less than two hundred dollars or one thousand francs."

"7° Abus de confiance, détournement soit par des dé- [fol. 13] positaires publics, soit par des officiers ministériels ou publics; détournement par une personne salariée au préjudice de son patron, détournement ou soustraction par aubergiste, voiturier, batelier ou leurs préposés lorsque ces actes sont punis par les lois des deux pays et lorsque le montant des sommes ou valeurs sur lesquelles porte l'infraction n'est pas inferieur à 200 dollars ou 1,000 francs.

8° Escroquerie, vol, lorsque ces actes sont punis par les lois des deux pays et lorsque le montant des sommes ou valeurs sur lesquelles porte l'infraction n'est pas inférieur à 200 dollars ou 1,000 francs."

7. Through diplomatic channels, your complainant is informed and believes that requisition for the above-named fugitives, Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker is about to be made, accompanied by the formal papers upon which demand for extradition is founded.

Whereupon your petitioner, acting under the authority and in the behalf stated, prays the consideration of this petition and that warrants may issue for the arrest of the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker charged as aforesaid, that they may be brought before a commissioner or magistrate qualified to act in extradition matters, to the end that evidence of criminality may be heard, and if, on such hearing he deems the evidence sufficient to sustain the charge under the provisions of said treaty, said magistrate or commissioner shall certify the same to the Secretary of State, at Washington, D. C., in order that warrants may issue upon [fol. 14] the requisition of the proper authority of said foreign government for the surrender of the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker according to the stipulations of said treaty, and for such other action as the said commissioner or magis-

trate is required under the provisions of said treaty and the laws of the United States to take.

Dated at New York, N. Y., July 25, 1935.

P. Moeneclaey.

Subscribed and sworn to before me this 25th day of July, 1935. Garrett W. Cotter, United States Commissioner, Southern District of New York. (Seal.)

UNITED STATES OF AMERICA,
Southern District of New York, ss:

To the Marshal of the United States and to his Deputies and any or either of them, and to the Police Commissioner of the City of New York, or any Peace Officer within said City: Greeting:

Whereas, complaint on oath has been made to me charging that Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker are in the City, State and Southern District of New York as fugitives from the justice of the French Republic, and charging said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker with having committed within the jurisdiction of [fol. 15] the French Republic on June 12, 1935, the crimes of fraud and breach of trust (abus de confiance) and larceny and misappropriation of property (escroquerie), said crimes being provided for by the Treaty or Convention for Extradition between the Government of the United States of America and the Government of the French Republic signed January 9, 1909 and proclaimed July 26, 1911, as set forth in the sworn complaint of Pierre Moeneclaey hereto attached.

Now, therefore, you are hereby commanded in the name of the President of the United States of America to apprehend the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker and bring them forthwith before me or some Judge, Justice or Commissioner of the United States, wherever in the Southern District of New York they may be found, that the said Bertrand Coles Neidecker, Aubrey Neidecker and George William Neidecker may be then and there dealt with according to law.

Given under my hand and seal, in the year of our Lord, July 25, One Thousand Nine Hundred and Thirty-Five.

Garrett W. Cotter, United States Commissioner for the Southern District of New York. (Seal.)

[fol. 16] RETURN TO WRIT OF HABEAS CORPUS (GEORGE W. NEIDECKER)

Not printed because identical in content to that in proceeding of B. Coles Neidecker.

RETURN TO WRIT OF HABEAS CORPUS (AUBREY NEIDECKER)

Not printed because identical in content to that in proceeding of B. Coles Neidecker.

[fol. 17] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RETURN (B. COLES NEIDECKER)

The petitioner herein traverses the return of the respondent herein and alleges as follows:

1. He reiterates each and every allegation contained in his petition for a writ of habeas corpus heretofore issued herein.

2. He alleges that all proceedings had, or attempted to be had, before the United States Commissioner in the Southern District of New York upon the complaint herein and the warrant issued by him are illegal, void and without authority of law because he did not have, and has not had, jurisdiction over the person in this petition.

3. He alleges that by reason of the facts set forth in his petition for a writ of habeas corpus, he is being deprived of his liberty without due process of law.

Dated New York, N. Y., August 12th, 1935.

B. Coles Neidecker, Petitioner.

Sworn to before me this 12th day of August, 1935. Thomas B. Moran, Notary Public, Queens County. Queens Co. Clk. No. 1992 Reg. No. 1617. Certificate filed in Nassau County. N. Y. Co. Clk. No. 718, Reg. No. 6-M-423. Commission expires March 30, 1936.

[fol. 18] TRAVERSE TO RETURN (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

TRAVERSE TO RETURN (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 19] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

Before Hon. Johnson J. Hayes, District Judge

[fol. 20] New York, August 19, 1935, 11 a. m.

Appearances:

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Appearing on behalf of the Govern- of the French Republic; Porter R. Chandler, Esq., of Counsel.

Coudert Brothers, Representing the Petitioners Aubrey Neidecker, B. Coles Neidecker, and George Neidecker; Frederick C. Bellinger, Esq., of Counsel.

MEMORANDUM DECISION

HAYES, J.:

The Court: Gentlemen I have read the briefs that have been submitted here and read the authorities, as best I could during the spare time I have had, and I have come to the conclusion that the petitions for writs of habeas corpus should be denied, and that the writs which have been granted should be discharged.

I will concede that the clause in the Mexican Treaty, until its recent modification, is identical with the Clause V in the Franco-American Treaty; that so far as the relationship of our Government with the Government of Mexico, while that clause remains the same, is concerned, that the precedent, I believe, of judicial authority and executive construction was to treat the clauses as excluding or denying [fol. 21] the right of the Government to extradite one of its own citizens. I think, however, it is significant that the Treaty with Mexico has been amended since the McCabe decision so as to expressly provide for the exercise of discretion on behalf of the Executive to grant the extradition of one of its own citizens.

The clause seems to be one of very general use in treaties in a great number of nations. So far as the authorities submitted to me are concerned, there seem to have been but two courts that have passed upon the clause or have construed it. The United States District Court in the application of one McCabe, in the year 1891, 46 F. 363, I believe it was, held that the clause in question did not give the Executive power to exercise any discretion, and that under that clause a citizen could not be extradited. The other deci-

sion is one of the Queen's Bench, in re Galwey, decided I believe in 1896, 1 Q. B. 230. That court was construing the same clause. After the English court had held that the clause gave the Executive discretionary power to extradite one of its citizens, no other court, so far as I know, has had occasion to construe the clause. Eight years after the McCabe decision was rendered, the Treaty between Mexico and America was altered, and that clause contained an express provision that the Executive might in his discretion extradite a citizen.

I am of the opinion, and would undoubtedly hold, in the absence of the amendment of the Mexican Treaty eight years after the McCabe decision, that no authority would exist to extradite one of our citizens to Mexico, because the parties themselves, by their course of conduct, had adopted that construction of the clause; but I do not think [fol. 22] it follows that the same interpretation which our government placed on that clause of the treaty with Mexico should be followed with all the other nations where a similar clause appears in the treaty. In other words, while the practice with Mexico over a long period of time has given that clause, insofar as it pertains to Mexico, that definite meaning, my attention has not been called to similar practice with any other country where the treaty contains the same clause; moreover, the decision of the English court, five years after the McCabe case, holding that the clause gives the Executive discretionary power to extradite a citizen, and the abrogation made of the former practice indulged in with respect to Mexico by our own country, indicates, to my mind, that this clause which affects so many nations should not be given a narrow judicial interpretation, and that the court should be slow to hold that an executive is without any power whatever to extradite a citizen, but that the reasoning of the situation suggests an interpretation in harmony with the English court, giving to the executive discretionary powers rather than to hold that he had no power in the premises. The first clause in the treaty expressly provides for the extradition of persons, without limitation, who have violated the laws of one country and taken asylum in the other. I do not believe that Clause V was intended to remove all the power which was conferred in Clause I of the Treaty. Persons adept in the use of both the French and the English language in phrasing the treaty

would have used words more definitely expressive of the intention to exclude the provision as to citizens if that had been the intention of the parties. If Clause I had not been [fol. 23] intended to include all persons, it is difficult to understand why they did not say persons "except citizens" who violate the law shall be extradited.

I do not hold that the American Government is compelled by the Treaty to grant the extradition of these petitioners. I merely hold that, in the opinion of the Court, the executives of the American Government have the discretion to grant the extradition. The power to do so is expressly contained in Clause I. The effect of Clause V is not to exclude, but it is to confer upon the executive the discretion when one of its citizens is the subject of extradition. I think that the term that the contracting party should "not be bound to surrender" is used in the sense that the party is not compelled to do so, and vests in the executive the discretion in the premises.

Mr. Bellinger: If your Honor please, I most respectfully except to your Honor's ruling, and I ask that we may take our appeal to the Circuit Court of Appeals, and I would further ask, if your Honor please, that you allow the three petitioners to continue in the custody of my partner, Mr. Frederic R. Coudert, Jr. I do not think that any of them have any intention of leaving; they came home and they desire to stay here. One of my clients was decorated in France for bringing down a German plane. He has led a very fine life——

The Court: Let me interrupt you just to point out one further thing in this oral opinion by the Court. The parties here have not been given a preliminary hearing. I am assuming that under the decisions of the United States Supreme Court, that the sole question which I have for consideration here is one of jurisdiction; that is, whether in any event, the United States Commissioner or any other [fol. 24] tribunal had any power in the premises to extradite one of our citizens to France.

Mr. Chandler: That is correct, your Honor.

The Court: And I am also assuming that there is not any controversy about the fact these petitioners are citizens of the United States.

Mr. Chandler: They are so described in the request for extradition which we have had from the Paris police. We will fully concede they are native-born American citizens.

The Court: Let me go one step further. The position has been urged upon this Court that this Court should follow the law laid down in the McCabe case and the interpretation of the clause as adopted by the Secretaries of State construing the same clause in our relationship with Mexico. The point the petitioners urge is that it was the unbroken practice indulged in by the Secretary of State in this country. My attention has not been called to any specific instance where the Secretary of State has so ruled in our dealings with the French Republic or with any other nation where the treaty contains this same clause. If it had been true, as contended by the Petitioners, that the Secretary of State here holds that no power exists under this treaty to extradite the petitioners, what the Court has said here will not deprive the Secretary of State of the exercise of that right. The Court is of the opinion that if the position which the petitioners take in that respect is tenable, that the proper forum to present that relief is to the Executive Department rather than to the judicial branch.

Just so that we can clarify one thing. I am not trying to bind the hands of the Secretary of State; I think it is [fol. 25] entirely with him to do as he deems proper under the circumstances, but I do not think this Court should adopt an ironclad rule and say no American citizen who commits a crime in France and takes refuge here, fleeing from his crime in France, could be extradited and sent back there for trial. I do not think this Court should say that in the face of this language and in view of what has been said by the only two courts that have had occasion to pass upon it. I have great respect for the United States District Court of Texas, and I also have great respect for the opinions of Secretaries of State who have interpreted that same clause. On the other hand, I have profound respect for the decision of these three English Judges who decided the Galwey case and the reasoning in that case, and the interpretation which they place upon that clause, it seems to me, is unanswerable. Since our own country, having exercised that uniform course of conduct with Mexico, I would be bound to follow it, unless they had changed the treaty. The fact that they came together and changed that eight years after the McCabe decision indicated that our Government wanted to get out of the predicament it was in. It

is also significant to me that this occurred also after the decision which had been rendered by the English court.

Mr. Bellinger: If your Honor please, I understood your Honor to say in your opinion that had not the Treaty with Mexico been changed, that is if the present treaty continued using the same words that the French treaty used, you would hold that the American nationals could not be returned to Mexico. Am I right?

The Court: That is what I said, but I intimated that the clause is not free from ambiguity, and the parties themselves had placed a practical construction upon that very clause, by which both contracting parties agreed that it would not confer upon either the right to extradite their own citizens.

[fol. 26]

Mr. Bellinger: Under the laws of France, it is against the law for France to extradite a French national.

The Court: That law, according to your brief, was not enacted until 1927, after the treaty had been adopted in 1909.

Mr. Bellinger: But that is the present law in France today.

The Court: Just a moment. If that had been the law at the time that this treaty was adopted in 1909, I would hold with you without question, but up until the adoption of the treaty in 1909 there was no restriction between the two Governments of France and America with respect to extraditing their own citizens. There was no restriction at all. It was first introduced in 1909. At that time there was no restriction, so far as you gentlemen called my attention to, on the part of the French Government to extradite one of its own citizens; but in 1927 France passed a law that prohibits the extradition of its citizens. I do not see how the law passed in 1927 by France could throw any light on the clause which we are referring to, an ambiguous clause contained in the treaty of 1909.

Mr. Bellinger: That, your Honor, illustrates the course of conduct, and if we are going to have one course of conduct towards Mexicans, or when we are dealing with Mexicans, where the same phraseology is in the treaty, your

[fol. 27]

Honor makes one interpretation, and in dealing with Frenchmen, having the same phraseology in effect in the treaty, your Honor distinguishes between those two courses, saying that the Mexican course of conduct was different; that the course of conduct there is different.

Now I do not know that there has always been the same course of conduct between France and the United States.

The Court: You did not call to the Court's attention any specific instances where our Government and the French Government had placed that interpretation on that clause. I do not recollect whether the question had arisen between the two Governments. I do not know how they have acted on it.

Mr. Chandler: The State Department has cited the McCabe case in an informal connection with respect to extradition treaties. They have indicated that, and it seems it would be lacking frankness if I did not tell your Honor that. I have no specific documents on that, but it seems that such requests have come from some other countries, and I believe, in some instances, the State Department has said, in effect, we would like to send American citizens back, but that under Judge Maxey's decision we have not got the power. I call your Honor's attention of course also to the fact that Italy has flatly refused to extradite any Italian under any circumstances. But on the other hand, we have and still do surrender American citizens to Italy, and the Supreme Court upheld that practice in Charlton v. Kelly, which is cited in my brief.

Mr. Bellinger: This is this still further point, your Honor: we are here in the United States Court, and we have [fol. 28] the American law with us; we have four Secretaries of State who have so decided. There are no American decisions to the contrary. Therefore it is the American law. My opponent, Mr. Chandler, has presented some English cases. We are contending for the American law, that we should be bound by the American law unless there is a conflict in American law, and at that time we should look to the other side, to the British, the French or any other European law.

The Court: I have never understood that one district could establish a rule of law that was binding on all other District Judges. I stated in my oral opinion that were the same facts before me that were before Judge Maxey in the McCabe case, I would hold as he did, but many things have happened since that decision that I think force the conclusion that I have adopted here. It is not a question of exercising a preference, whether I will disregard American law and will follow English cases. I think that when

we deal with questions here of such great international concern, we should consider and have decent respect for the opinions of mankind generally, and particularly to able judges wherever they may be found, instead of restricting it to a technical definition of the meaning of a treaty clause which is of such general international use. For that reason I do not think it calls for any adherence to any particular tribunal, but it just calls for an honest endeavor to find out, if the Court can, the intention of the contracting parties, and what I am saying is that the reasoning in the in re Galway case appeals to this Court, that the course of conduct of our own country with respect to Mexico has been altered, and that our country has manifested a desire to get away from the interpretation that [fol. 29] was placed there by the Secretary of State and by the United States District Court by amending the Mexican treaty.

What have you to say about the parole of these defendants pending appeal?

Mr. Chandler: I think the appeal can be presented fairly shortly. I think our Circuit Court of Appeals calendar is quite up to date. I am not sure whether such cases are not given a preference. I have the greatest respect for Mr. Coudert; but I do not know whether paroling in the custody of an attorney or placing fairly low bail would be better; I think either would be satisfactory, in your Honor's discretion.

The Court: I do not know anything about this paroling in the custody of an attorney. Is that indulged in here?

Mr. Bellinger: I think, your Honor, there has been an exception made in this case. As I said before, your Honor, this man is a war hero. He has not been convicted of any crime. I have got the greatest respect for the French Government—I am partly French myself. It may turn out that this man may be innocent after he had spent some time in jail. Therefore I am going to ask your Honor, in view of the fact that the Circuit Court of Appeals does not sit until October, to either release this man in my partner's, Mr. Coudert's, custody, or fix a nominal bail. In other words, I do not want my clients in jail during that time.

The Court: Have you any suggestion as to the amount of bail?

Mr. Chandler: We will be satisfied with $5,000 each, your Honor.

The Court: I suppose they can give that?

[fol. 30] Mr. Bellinger: I can get bail, your Honor, although these petitioners are in the Bankruptcy Court and they couldn't give anything themselves.

The Court: They may be released on bail in the sum of $5,000 each pending the appeal to the Circuit Court of Appeals. I do not know what the rule is here about perfecting this appeal. Ordinarily in the Circuit Court the Circuit Court grants release but not until the papers have been presented to the Court. Have you any rule here in regard to that? What is your rule?

Mr. Manning: Here the rule is that the Court of Appeals fixes bail, and when the Court of Appeals is not sitting, application may be made to the District Court for relief.

The Court: That is what I suggest. You have merely stated in open court that you are going to appeal.

Mr. Chandler: The record is so short that it can be made up quickly, without any difficulty. I would have no objection if your Honor paroled the petitioners in Mr. Coudert's custody for another week and the appeal may be perfected within that time.

Mr. Manning: I might suggest counsel make application to one of the Circuit Court Judges.

Mr. Bellinger: We have no objection to the amount of bail suggested by Mr. Chandler and I would ask for one week in which to furnish bail. We will probably furnish it much sooner.

(Discussion off the record.)

The Court: I wish you gentlemen would confer, and any papers you desire for me to sign, I would be glad if you could do that and have them here ready for signature by Thursday.

Mr. Chandler: I think it could be done. I think we can do that by Thursday.

[fol. 31] IN UNITED STATES DISTRICT COURT

Present: Honorable Johnson J. Hayes, United States District Judge.

In the Matter of the Application of B. COLES NEIDECKER for a Writ of Habeas Corpus

ORDER APPEALED FROM (B. COLES NEIDECKER)—Aug. 21, 1935

This cause came on to be heard upon the petition for the writ of habeas corpus herein, the writ of habeas corpus, the return to said writ and the warrant annexed thereto, the intervening petition of Pierre Moeneclaey, Acting Consul General of the French Republic, and the order entered thereon, and the traverse to said return; and the relator having been duly produced before the Court in obedience to the writ, and the cause having been argued on behalf of the relator by Frederic R. Coudert, Jr., Esq., and on behalf of the respondents by Porter R. Chandler, Esq., and the Court having made summary inquiry into the facts, and it appearing to the Court, and the Court having thereupon found and determined:

1. That the relator is held in custody pursuant to a warrant of the Honorable Garrett W. Cotter, United States [fol. 32] Commissioner, as set forth in the return to the writ herein, and

2. (Upon the concession of all parties in open Court) that the relator is a native-born citizen of the United States,

And due deliberation having been had and the Court having rendered its opinion herein,

Now, therefore, upon all of the foregoing and upon all the proceedings herein, on motion of Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the respondents, it is

Ordered, adjudged and decreed, that the writ of habeas corpus herein be and the same hereby is dismissed on the merits, and that the relator be remanded to the custody from which he came, subject, however, to the provisions of this order.

And the relator by his counsel having given notice in open Court of his intention to appeal from the dismissal

of the writ herein to the United States Circuit Court of Appeals for the Second Circuit, and having made application to be admitted to bail pending the determination of said appeal, upon motion of Coudert Brothers, attorneys for the relator, it is further

Ordered,

1. That the relator be paroled in custody of his counsel, Frederic R. Coudert, Jr., Esq., until 4 p. m. on Wednesday, August 28, 1935, and

2. That upon the presentation and allowance of a petition for appeal on behalf of the relator prior to 4 p. m. on Wednesday, August 28, 1935, and upon giving prior to said time a bond with sufficient surety in the sum of Five Thou- [fol. 33] sand Dollars ($5,000), in form to be approved by this Court, conditioned upon the obedience by the relator to any further order of this Court or of the United States Circuit Court of Appeals for the Second Circuit, the relator be admitted to bail in said sum of Five Thousand Dollars ($5,000) pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be, and that pending such final determination, all proceedings for the extradition of the relator as a fugitive from the justice of the French Republic be stayed.

(Sgd.) Johnson J. Hayes, United States District Judge.

Approved as to form, and notice of settlement waived. Coudert Brothers, Attorneys for Relator. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 34] Order Appealed From (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

Order Appealed From (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

[fol. 35] In United States District Court

Petition for Leave to Appeal (B. Coles Neidecker)

The petitioner, B. Coles Neidecker, by his attorney, Frederic R. Coudert, Jr., Esq., feeling aggrieved by the order and judgment made and entered on the 21st day of August, 1935, by this Court, dismissing the writ of habeas corpus herein on the merits and remanding the Relator to the custody from whence he came subject to the provisions of said order and judgment, does hereby appeal from said order and judgment of the Court to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, papers and proceedings, upon which the said order and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that meanwhile and pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be, the extradition of B. Coles Neidecker as a fugitive from the justice of the French Republic, be stayed.

Dated New York, August 28, 1935.

Frederic R. Coudert, Jr., Esq., Attorney for Relator, Office & P. O. Address, No. 2 Rector Street, Borough of Manhat-an, City of New York.

[fol. 36] Petition for Leave to Appeal (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Cole Neidecker.

Petition for Leave to Appeal (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Cole Neidecker.

[fol. 37] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS (B. COLES NEIDECKER)

Now comes the Appellant in the above-entitled cause before the United States Circuit Court of Appeals for the Second Circuit in the Borough of Manhattan, City of New York, and files the following assignment of errors in the record and proceedings aforesaid, upon which he will reply upon the prosecution of the appeal in the above entitled cause from the judgment and order made and entered herein on the 21st day of August, 1935.

The Court erred in dismissing the writ of habeas corpus herein on the merits and in remanding the relator to the custody from which he came for the following reasons:

1. The Court erred in its conclusion that the executive officers of the Government of the United States have the discretion to grant the extradition of the appellant, who is a citizen of the United States.

2. The Court erred in interpreting and construing the Extradition Treaty of 1909 between the United States and the Republic of France as conferring upon the executive officers of the Government of the United States the discretion to grant the extradition of the appellant, who is an American citizen.

3. The Court's interpretation and construction of the Extradition Treaty of 1909 between the United States and the Republic of France, as conferring upon the executive [fol. 38] officers of the Government of the United States the discretion to grant the extradition of the appellant, an American citizen, renders such Treaty in contravention of the Constitution of the United States and in particular of Section 1 of Article I thereof, of Section 2 of Article II thereof, and of Amendment V thereto.

4. The decision of the Court was and is contrary to the Constitution and laws of the United States.

Whereas by the law of the land said writ should have been sustained, and the Relator herein, by his attorney, Frederic R. Coudert, Jr., Esq., prays that the errors aforesaid, the judgment and order made on the 21st day of

August, 1935, may be reversed and for naught held and esteemed, and that the said appeal herein be sustained and the appellant herein be released from the custody in which he is held, and that the bond for $5,000. be cancelled and the Surety discharged therefrom, and for such other, further, additional, different and general relief as may to this Court seem just and proper in the premises.

Dated New York, August 28th, 1935.

Frederic R. Coudert, Jr., Attorney for Relator, Appellant, Office & P. O. Address, No. 2 Rector Street, New York City.

[fol. 39] ASSIGNMENT OF ERRORS (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bond stated therein is $2500.

ASSIGNMENT OF ERRORS (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bond stated therein is $2500.

[fol. 40] IN UNITED STATES DISTRICT COURT

Present: Hon. Robert P. Patterson, U. S. D. J.

[Title omitted]

ORDER ALLOWING APPEAL (B. COLES NEIDECKER)—Aug. 28, 1935

On reading the petition of B. Coles Neidecker, made by Frederic R. Coudert, Jr., his attorney, on his behalf dated the 28th day of August, 1935, for appeal, and on consideration of the assignment of errors presented herewith and a bond for costs in the sum of $250.00 having been approved herewith, it is

[fol. 41] Ordered that the appeal herein be allowed as prayed for; and it is further

Ordered that a certified transcript of the record, papers and proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit; and it is further

Ordered that the applicant herein, B. Coles Neidecker, be and he hereby is released to bail in the sum of $5,000 upon his filing with the Clerk of this Court a bond or undertaking to be approved by a judge of this Court in said amount, conditioned that he will abide by the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be; and it is further

Ordered that the extradition of B. Coles Neidecker be stayed pending the final determination of this cause by the United States Circuit Court of Appeals for the Second Circuit or the Supreme Court of the United States, as the case may be.

Robert P. Patterson, U. S. D. J.

August 28th, 1935.

Bail in the sum of $5,000 consented to.
Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 42] Order Allowing Appeal (George W. Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

Order Allowing Appeal (Aubrey Neidecker)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker except that amount of bail fixed is $2500.

[fol. 43] Citation, in usual form (B. Coles Neidecker), omitted in printing.

[fol. 44] CITATION (GEORGE W. NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

CITATION (AUBREY NEIDECKER)

Not printed because identical in form and content to that in proceeding of B. Coles Neidecker.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Titles omitted]

STIPULATION CONSOLIDATING APPEALS AND AS TO CORRECTNESS OF TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true copy of the transcripts of the record [fol. 46] the United States District Court in each of the above entitled proceedings as agreed on by the parties, and it is

Further stipulated and agreed that the appeals taken by the relators B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker in the above entitled proceedings be consolidated and that the records of such appeals may be printed together under one cover and certified as one appeal by the Clerk of the United States District Court, Southern District of New York, and considered by the Clerk of said Court and the Clerk of the United States Circuit Court of Appeals for the Second Circuit as such.

Dated, October 14, 1935.

Frederic R. Coudert, Jr., Attorney for Relators.
Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents.

[fol. 47] IN UNITED STATES DISTRICT COURT

ORDER CONSOLIDATING APPEALS

On reading and filing the foregoing stipulation, it is

Ordered, that the appeals taken by the relators B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker in the above entitled proceedings be, and the same hereby are, consolidated and the records of such appeals may be printed together under one cover and certified as one appeal by the Clerk of the United States District Court, Southern District of New York, and considered by the Clerk of the said Court and the Clerk of this Court as such.

Oct. 15/35.

Manton, U. S. Circuit Judge.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49]

STIPULATION AND ORDER OF SUBSTITUTION OF FRENCH CONSUL GENERAL

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the name "Joe Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER

vs.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

ORDER

Upon reading and filing the annexed stipulation, and sufficient cause being shown therefor, it is

Ordered that Charles de Ferry de Fontnouvelle, Consul General of the French Republic in New York, be and he

[fol. 50] hereby is substituted as an intervening party respondent and appellee in each of these cases in the place and stead of Pierre Moeneclaey, former Acting Consul General of the French Republic in New York, without prejudice to the proceedings already had therein, and that these proceedings may be continued and maintained against said Charles de Ferry de Fontnouvelle, as successor to said Pierre Moeneclaey.

Dated New York, N. Y., December 5, 1935.

Wm. Parkin, Clerk.

Filed 12/5/35.

[Same title]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto as follows:

1. Pierre Moeneclaey, former Acting Consul General of the French Republic in the City of New York, who was heretofore granted leave to intervene as a party respondent in each of these cases under date of August 12, 1935, has since that date ceased to be such Acting Consul General.

2. Charles de Ferry de Fontnouvelle is now Consul General of the French Republic in the City of New York, as successor to said Pierre Moeneclaey, and is desirous of being substituted as an intervening party respondent in these cases in his place and stead.

3. An order in the form annexed to this stipulation may be entered by the attorneys for any party hereto without [fol. 51] notice.

Dated New York, N. Y., December 4, 1935.

Frederic R. Coudert, Jr., Attorney for Relators-Appellants. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Respondents-Appellees.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES ex Rel. B. COLES NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

UNITED STATES ex Rel. GEORGE W. NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

UNITED STATES ex Rel. AUBREY NEIDECKER, Appellant,

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, Appellee

Before Manton, L. Hand and Chase, Circuit Judges

Appeals from three orders of the District Court for the Southern District of New York, dismissing writs of habeas corpus to review orders of a United States Commissioner, holding the relators pending extradition proceedings under § 651, Title 18, U. S. Code.

Frederick R. Coudert, Jr., for the appellants.
Porter R. Chandler, for the appellee.

[fol. 53] L. HAND, Circuit Judge:

These are appeals from the denials of writs of habeas corpus to review the legality of the relators' detention in the following circumstances. Citizens of the United States, they were taken into custody by the respondent, Valentine, police commissioner of New York, upon cable request from the proper French authorities; the charge against them concerned financial dealings in Paris, whence they had fled to New York to escape arrest. Upon the request of the "acting" French consul, a United States Commissioner for the Southern District of New York issued warrants for their arrest in pursuance of § 651 of Title 18, U. S. Code; the

writs were allowed at this point in the proceedings. The relators agree that they cannot succeed, unless the commissioner had no power to hold them awaiting the outcome of the proceedings, and that he had that power unless our treaty with France does not authorize the Secretary of State under any circumstances to surrender Americans who have committed extraditable crimes in France and sought asylum here. The judge thought that it did so authorize him; for this reason he dismissed the writs and the relators appealed.

The controversy is very narrow; it is limited to the meaning of Article Five of our extradition "convention" with France, which is in these words: "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." The first French extradition treaty was negotiated in 1843, and remained unchanged until 1909; it required both parties to surrender all "persons" without condition, and under our interpretation of such clauses, it covered nationals of the [fol. 54] contracting parties. Charlton v. Kelly, 229 U. S. 447. But France, following a tradition more than a century old in 1843, did not so understand the words, and we had never been able to secure the delivery of a Frenchman for trial. She regarded it as an equivalent that, unlike ourselves, she will prosecute her nationals for crimes committed abroad. The language of Article Five appears for the first time in our extradition treaty with Prussia of 1852; it is in contrast with Article 24 of the almost contemporaneous treaty with the two Sicilies of 1855, which explicitly exempted "citizens and subjects of each of the high contracting parties". So it might be plausibly argued that throughout the fifties and sixties the Prussian clause meant that, although the parties were not obliged to surrender their own nationals, they reserved a discretionary power to do so; while internationally this would indeed be brutum fulmen, it might have its uses domestically. The Prussian clause appeared in substantially the same form in eight treaties between 1852 and 1874 without apparently raising any question;* but in that year the point was mooted under

* Bavaria, 1853; Hanover, 1855; Austria, 1856; Baden, 1857; Norway and Sweden, 1860; Mexico, 1861; Peru, 1870; Belgium, 1874.

the Mexican treaty of the surrender of a Mexican, who having committed a crime in Texas, fled to Mexico. Secretary Fish refused to request the Mexican authorities to surrender him, and although his reasons are apparently not now accessible, the ruling itself was inconsistent with the belief that the clause reserved to both parties a discretionary power of surrender. If it did, it certainly was his duty to ask for the exercise of that discretion. In 1884 the con- [fol. 55] verse situation arose; an American, having committed an extraditable crime in Mexico, sought asylum here. Secretary Freylinghuysen refused to deliver him upon demand by Mexico, following the precedent of 1874. This ruling does not as such deny the existence of a discretionary power, but the reasons given at the time did deny it, for the treaty was construed as absolutely exempting nationals. The same sort of case arose again in 1888 and Secretary Bayard also refused to surrender the fugitive, accepting the ruling of Secretary Freylinghuysen and giving the same reasons more explicitly. Finally in 1891 as in 1874 a Mexican who had committed an extraditable crime here fled to Mexico. Secretary Blaine following the earlier precedents, refused to demand his surrender, declaring that the clause had been "held to preclude the surrender of a citizen of the United States"; and that for this reason "the government is precluded from demanding the extradition of fugitives in the present instance." In the same year a writ of habeas corpus came on before Judge Maxey in the Western District of Texas, to discharge from arrest an American woman charged with having killed a man in Mexico. Ex parte McCabe, 46 Fed. Rep. 363. He sustained the writ, particularly relying upon the four precedents we have just cited. We are not immediately concerned with the correctness of that decision when rendered, though it was never appealed; but the fact that the treaty had been judicially as well as diplomatically construed is of importance.

Five years before, in 1886, when Secretary Fish's ruling was already twelve years old, and Secretary Freylinghuysen's was two, we negotiated an extradition treaty with Japan in which a variant for the first time appeared: [fol. 56] "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to

do so." It will be at once observed that this did explicitly confer a discretion, which, as we have suggested, the Prussian clause might perhaps have originally borne. With these alternatives before us, we negotiated seventeen extradition treaties between 1891 and 1909, and three more in 1909, including that at bar. Of these, fourteen adopted the Prussian clause,* and six, the Japanese.** Since 1909 the first has been repeatedly used, but the second apparently disappeared in 1905.

The Supreme Court in 1913 had before it an extradition treaty with Italy, which, like the French treaty of 1843, required the surrender of all "persons" unconditionally.*** This the court held to include an American fugitive from Italy, though Italy, like France, refused to reciprocate, insisting that her power to prosecute her own nationals for crimes committed abroad was an equivalent. The decision is not therefore in point here, but the opinion (pp. 467, 468), classified our treaties into two classes, those [fol. 57] which require the surrender of nationals, and those in which the Prussian clause "exempts" them. Significantly the court speaks of the Japanese clause as a "qualification" of only the first. We cannot entirely disregard this language, as the respondent would have us do, though it is true that it is not as authoritative as though the case had turned upon it. A ruling of an English court (In Re Galway, (1896) 1 Q. B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. Regina v. Wilson, 3 Q. B. 42. In that year it was amended and what we have called the Prussian clause was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse

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*Sweden, 1893; Norway, 1893; Peru, 1899; Chile, 1900; Bolivia, 1900; Belgium, 1901; Servia, 1901; Denmark, 1902; Cuba, 1904; Spain, 1904; Panama, 1904; Honduras, 1909; Dominican Republic, 1909; France, 1909.

**Argentina, 1896; Orange Free State, 1896; Mexico, 1899; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905.

***Charlton v. Kelly, 229 U. S. 447.

of that before us now; that is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred.

It appears to us that the language of Article Five is not so uncompromising as to be immune from interpretation; few statutes are. A treaty is a contract, and a contract does not prescribe that the parties shall retain their freedom of action, unless it means to exempt them from other stipulations it may contain. An extradition treaty "binds" the parties, and as to matters which it was not meant to bind them, it was natural to say that they should not be "bound"; from that it is not to be assumed that they meant in addition gratuitously to assert that they reserved the [fol. 58] power to surrender their own nationals if they chose. They could do so without any such reservation. Ker v. Illinois, 119 U. S. 436; Greene v. U. S., 154 Fed. Rep. 401, 410 (C. C. A. 5); U. S. ex rel. Donnelley v. Mulligan, 76 Fed. (2) 511 (C. C. A. 2). True, we did just that in the Japanese clause, and it was unnecessary internationally; but, as we have already suggested, it may have been adopted to give the Secretary power under our implementing statute, § 651, Title 18, U. S. Code, which requires that there shall be some "treaty or convention for extradition". That means not only that a treaty exists, but that it assumes to cover the situation. If it be once conceded that the words do not speak so clearly that usage and practical construction are irrelevant, the relators' construction is surely right, for it would be hard to imagine a setting more convincing. The uniform rulings of four secretaries of state, backed by that of a court, were surely not disregarded when the words so construed were used later. This conclusion is confirmed by the parallel use on a number of occasions of the Japanese alternative, in which exactly that provision is explicitly adopted which the precedents declined to find implicit in the original. Finally, it is not likely that in dealing with France, a country whose position had been declared for over a hundred and fifty years, and which we knew would under no circumstances surrender her nationals, we should have reserved to her a discretion to do what she had consistently refused to do in the face of more peremptory words; or to ourselves a discretion to accept a unilateral burden.

It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty; and [fol. 59] we should feel free to act more drastically if we had before us only customary law which had persisted beyond the period which had created it, and yet had not called forth enough opposition for its repeal. But we are dealing with a clause chosen by the President and Senate out of the diplomatic locker, and encrusted with its proper traditions, which in such matters count for much. Nielson v. Johnson, 279 U. S. 47, 52; Factor v. Laubenheimer, 290 U. S. 276, 295. Even though we thought we could infer how they would act in this specific case, a decent reserve and a justified doubt should restrain the substitution of our own judgment for the words they selected. But it is by no means self-evident that they would consider the prosecution of Frenchmen in French courts an equivalent of their surrender; and even if they did, other considerations might block a bargain, for into diplomatic negotiations much enters which does not see the light. Though we were not ourselves disposed to higgle, we should have no right to impose our disposition upon the result of their negotiations. The arguments by which the exemption is defended may not indeed be persuasive; "les juges naturels" may be no more than an euphemism for friendly bias; but nationalism is not dead, and most nations have shown a persistent repugnance to submit their citizens to foreign courts. We have indeed an honorable record; but it is uncertain how far our diplomacy is yet prepared to give where it does not receive.

Orders reversed; relators discharged.

Judge Manton dissents, with opinion.

[fol. 59½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. U. S. ex rel. Niedecker v. Valentine. (3 cases.) Opinion. L. Hand, C. J.

[fol. 60] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

PRESIDENT OF THE UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER

against

LEWIS J. VALENTINE, Police Commissioner of the City of New York, and "John Doe", the Name "John Doe" Being Fictitious and Being Used to Designate His Agent, Deputy Aide or Some Other Person Having in Custody the Relator

[fol. 61] MANTON, Circuit Judge (dissenting):

This is a consolidated appeal by the relators B. Coles Neidecker, George W. Neidecker, and Aubrey Neidecker, who admittedly have always been citizens of the United States, from orders entered on August 21, 1935, dismissing their several petitions for writs of habeas corpus. The relators were taken into custody by the Police Commissioner of the City of New York under warrants issued by the United States Commissioner on July 25, 1935, upon

complaint of the acting Consul General of France in the City of New York, charging relators with crimes clearly extraditable under Article II of the Treaty of Extradition of January 6, 1909, between the United States and France.

Their petitions for writs of habeas corpus are grounded on, first, that American citizens are absolutely and of right exempt from extradition to France under Article V of said treaty; and, secondly, that to construe Article V as giving the Chief Executive a discretion to surrender a citizen would amount to an unconstitutional delegation of power and, moreover, in violation of the Fifth Amendment.

While neither question is new in Anglo American jurisprudence, the paucity of direct judicial precedents and their apparent conflict, make it imperative that we examine it afresh and in some detail, with a view to determining which of the divergent views expresses for this court the correct construction of provisions couched in the terms of Article V of which there are a large number in our other treaties with foreign powers.

[fol. 62] Under Article I of the treaty here involved, the contracting powers "mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offenses" mentioned in Article II, "shall seek an asylum or be found within the territories of the other." Under Article V, "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

These two articles represent the most satisfactory formula conceived thus far to reconcile two seemingly conflicting tendencies in the plane of international penal law. The one tendency is toward the fullest possible international cooperation for the suppression of crime by facilitating the apprehension of common criminals who have escaped from the territorial jurisdiction of the locus delicti; the other tendency is toward the protection of nationals against prosecution in foreign tribunals infiltrated with national, racial or religious animosities, or administering a cruel, inhuman or antiquated system of laws or refusing reciprocity. These two tendencies thus present delicate questions of law and policy which it has been the constant effort of Statesmen and jurists to reconcile.

The extradiction of nationals has been, unquestionably, one of the most debated topics of international concern;

and although the weight of policy is apparently against it, yet, the weight of law is for it. Dealing, as we are, with a French treaty, it is not amiss to advert to the legislative history of France, which has not been entirely uniform [fol. 63] on this question. In 1376 France and Savoy made a treaty for the reciprocal extradition of criminals, which applied also to their respective nationals: omnes et singulos homines nostros nobis mediate vel immediate subjectos, qui delinquerunt et quomodolibet in futurum in comitatu Sabaudiæ. (5 Isambert's Recueil Général des Anciennes Lois Françaises, 479). An imperial decree of October 23, 1811, outlined the procedure to be observed by the French authorities in acquiescing to the demands for the extradition of French subjects. (12 Bulletin des Lois [1836] 324). On the other hand, the Extradition Laws of April 4, 1879 (Art. 1) and of March 30, 1927 (Art. V), forbid his extradiction. This reversal in the practice of extradition has been due, as will be shown presently, to the exaggerated development in the continental Europe of the conception of personal jurisdiction, which has not, however, found much favor in the Anglo-American school of legal thought. Be this as it may, it is quite safe to say that the tendency in more recent times has been decidedly to discard the false arguments with which the practice of the non-extradition of nationals has been upheld and to provide, in one form or another and under proper guarantees, for their extradition; and this practice is more consonant with the true principles and spirit of international penal law. Over a century ago, Chief Justice Marshall, in the case of The Exchange (7 Cranch. 116, 144) announced the principle that:

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of [fol. 64] trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption."

This general principle has found concrete application to the question of the extradition of nationals. The Supreme Court, in Neely v. Henkel (180 U. S. 109, 123), said:

"We are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the community whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States."

In England, the Court of Queen's Bench in Queen v. Glanz (1882) 9 Q. B. D. 93, 100, stated the same view.

"I would say that the leading principle which underlies all questions of nationality as applied to crime committed within any particular country is this. Whatever rights, civil or otherwise, a man may have which may be affected [fol. 65] by his domicile, it is and must be perfectly clear by the law of all nations that each person who is within the jurisdiction of a particular country under which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilized method."

That this is the doctrine of International Law is the opinion of the Supreme Court in the case of Charlton v. Kelly (229 U. S. 447, 467), wherein that court, after a searching inquiry into the question, delivered itself thus:

"The conclusion we reach is that there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons', where no such exception is made in the treaty itself. Upon the contrary, the word 'persons' includes *all* persons when not qualified as it is in some of the treaties between this and other nations."

The Supreme Court of Mexico in 1878, speaking through Chief Justice Vallarta (one time Minister for Foreign Af-

fairs of his country), in the case of the Extradition of J. M. Dominguez and F. Barrera (1 Vallarta, Cuestiones Constitucionales [1879] 1, 35), Mexican citizens whose surrender was demanded by the authorities of the United States, said that the extradition of nationals is "a *desideratum* of the most enlightened publicists; is a tendency toward the international well being of nations; is a requirement of civilization, which does not wish that the operation of justice should stop at the frontiers."

[fol. 66] International recognition for this principle has not been wanting. Article 20 of the Montevideo Treaty on International Penal Law (1888-1889) provides:

"Extradition exercises all its effects, and in no case shall the nationality of the accused prevent it."

The most recent legal scholar to express an opinion on this question is Prof. Puente who, commenting this article observes (Principles of International Extradition in Latin America, 28 Mich. Law Rev. [1930] 710) that it rests "on far more tenable grounds than the doctrine to which we have alluded [of the non-extradition of nationals]—a doctrine which, in a veritable sense, is a survival from an age more primitive in the concepts and administration of substantive and adjective law than our own. The present enlightened state of public opinion in the countries comprising the family of nations; the tolerably moderate character of their laws; the generally honorable, impartial and competent composition of their judiciary; and finally, the potential danger of diplomatic interposition by foreign governments in behalf of their nationals in the event of a miscarriage or denial of justice: these evident factors, when taken together, show, beyond a doubt, the untenableness of the prevailing opinion in Latin America and elsewhere today in respect to the surrender of their own nationals for trial in the tribunals of a foreign state."

So much, then, for the history of this interesting subject. As we approach the analysis of the specific treaty and statutory provisions before us, we find that the sum total of the obligations assumed by the contracting states is "to [fol. 67] deliver up persons" (Art. I, Treaty of January 6, 1909, 3 Malloy's Treaties, 2580) accused of certain crimes; and that in order to carry out this obligation Congress has

outlined the procedure to be followed in effecting the provisional detention of such "person" (§§651, 653, Tit. 18 U. S. C. A.). In both cases the term employed to designate the subject of the request for extradition is "person". In the opinion of the Supreme Court in Charlton v. Kelly (229 U. S. 447, 465, 467), the term "persons" employed in Article I of the Treaty of Extradition of March 23, 1868 between this country and Italy was held to include etymologically, "citizens as well as those who are not." Article V of the French treaty recites, of course, that: "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." The question is whether this provision excludes absolutely the surrender of a citizen, or merely clothes the Chief Executive with a discretion to grant such surrender or not, as the circumstances of each case may dictate. It is upon this very question that the courts are in disagreement. Appellants cite in their support the case of Ex parte M'Cabe (46 Fed. [D. C. W. D. Tex.] 363) decided in 1891; and appellees rely on the English case of In re Galwey [1896] 1 Q. B. D. 230. The M'Cabe case had under consideration Article VI. of our Treaty of Extradition with Mexico of 1861, which is identical with Article V. of the French Treaty now before this court. The Galwey case involved Article I. of the Treaty of Extradition of 1876 between Great Britain and Belgium, as amended April 21, 1887, which said that: "In no case, nor on any consideration whatever, shall [fol. 68] the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization." Disregarding inconsequential changes of phraseology, the effect of these provisions is that the contracting governments shall not be bound to give up their own nationals to the other. The court in the M'Cabe case considered the request of the Mexican authorities for the extradition of a citizen of the United States charged with murder; and while it said that under Article I of the Treaty the term "persons" would justify the surrender of a citizen, it made the following dogmatic declaration without any exposition of reasons in its support:

"But the treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty'.

The obligation to deliver being denied, upon what can rest the authority?"

The whole fabric of the M'Cabe case rests on what was called the "practical construction given that article by the department of state", in the Primble case in 1889. In that case, Secretary of State Frelinghuysen said:

"The treaty confers upon the President no affirmative power to surrender an American citizen * * * I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States."

[fol. 69] The construction placed upon the terms of a treaty by the department of our government charged with the supervision of the foreign relations of the nations is entitled to respectful consideration and to much weight (Charlton v. Kelly, 229 U. S. 447, 468; Sullivan v. Kidd, 254 U. S. 433, 442); but, as the construction of a treaty is a judicial question (Sullivan v. Kidd, supra), the courts are not necessarily bound by an executive construction which they may deem to be erroneous, and must, therefore, be at liberty to use their independent judgment in arriving at the true meaning of its provisions. This was very clearly and forcefully illustrated in United States v. Rauscher (119 U. S. 407), in which the official construction placed by the American Secretary of State, Mr. Fish, on the treaty of extradition with Great Britain of 1842, was rejected by the court in favor of the construction urged by the British Foreign Minister, Lord Derby. It is difficult to accept Secretary Frelinghuysen's construction of the Mexican treaty for two reasons. In the first place, it is not correct to say that the treaty does not confer upon the President an "affirmative power to surrender an American citizen." Article I does that when it provides for the extradition of "persons". Charlton v. Kelly, supra. In the second place, the Secretary's construction changed the extradition formula from the discretionary to the prohibitive, and in doing so, he did not merely construe the treaty,—he also changed it.

In opposition to the views of our Executive Department, and incidentally to show the evident lack of consistency on

[fol. 70] the part of our authorities in construing the treaty under consideration in the M'Cabe case, I cite the construction given by the Supreme Court of Mexico in 1878 to Article VI of that treaty, in the matter of the Extradition of J. M. Dominguez and F. Barrera, supra, both of whom were citizens of Mexico, arrested upon request of the American authorities. Chief Justice Vallarta, speaking for the court, said (1 Cuestiones Constitucionales [1879] 34):

"It has been claimed that the final clause of article 6 of the treaty of December 11, 1861, prohibits, or at least does not authorize the extradition of nationals. This cannot be asserted without disregarding the value of the words of our language. The treaty of extradition celebrated with Italy, prohibits that extradition when it expresses itself thus: 'The extradition shall not take place if the accused is a national of the country' etc. Between those words and those of the treaty celebrated with the United States, which read: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty': between both clauses, I repeat, there exists all the distance that there is between prohibition and freedom. If the American treaty had intended to even restrict that freedom, it should have used words which would not have left it alive. But to understand both treaties in the same prohibitive sense, is something that the meaning of the words will not permit.

The extradition of nationals may be arranged in treaties in one of three ways: either prohibiting it, as is done in [fol. 71] the treaty with Italy; or making it obligatory, so that the surrender of citizens would be inexcusable; or permitting it—leaving it to the discretion of the Governments, as is done in the final part of article 6 of the treaty with the United States. This makes it difficult to mistake the prohibitive formula with the obligatory, or either of them with the discretionary. From the words of the treaty itself I conclude, therefore, that the extradition of nationals far from being forbidden, is permitted between Mexico and the United States."

A few years after this question in the Supreme Court of Mexico, Lord Russel, C. J., of the Court of Queens Bench in England, in the case of In re Galwey, supra, construing

the treaty of 1887 between Great Britain and Belgium, quoted above, said:

"What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

We thus have a very respectable weight of judicial opinion, supported by unanswerable arguments, in favor of the discretion or political formula of extradition as illustrated in the Mexican, Belgium and French treaties. If article VI had been omitted from the treaty now before us, would not the relators be liable to extradition under the term "person" of Article I? They certainly would be. Why, then, argue that our government is prohibited from surrendering a citizen merely because it shall not be bound to do so? The two articles should be construed, if possible, in a way [fol. 72] that will not impair each other, unless a different intention is evident from a comparison of their terms; and to construe article VI as giving discretionary powers to the Executive will leave the scope of article I under international law unimpaired, without doing violence to the words or reasonable implications of article VI.

It is true, of course, that Art. IV of the Extradition Convention of 1899 between the United States and Mexico expanded the provisions of Article VI of the Convention of 1861 (considered in the M'Cabe case) to read:

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention; but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

But the reason was merely to clear up doubts cast upon the plain meaning of the provisions of Article VI of the 1861 convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the M'Cabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 convention. It adds nothing because where the country is not bound but may surrender, discretion is necessarily implied.

Differing from the discretionary formula, is the prohibitive; a sample of which is the Italian treaty quoted by

Chief Justice Vallarta in his opinion, and the Swiss treaty, which was considered by the court of Queens Bench in Queen v. Wilson [1877], 3 Q. B. 42, 44, of which Cockburn, [fol. 73] C. J., said: "The treaty does not give a discretion. It says no British subject shall be delivered up."

This brings us to the last question, namely, whether to construe article V of the treaty as giving the Executive a discretion to surrender citizens, would amount to an unconstitutional delegation of power depriving such citizens of liberty without the due process of law guaranteed by the Fifth Amendment. To clothe the Executive with discretion in such matters, following the approved diplomatic formula, can be regarded as "neither capricious nor arbitrary, as has been supposed, but enlightened by considerations of national convenience which must be borne in mind at every step, and subject to the rules of the law of nations. The latter, which does not guarantee the impunity of crime but which today tends, on the contrary, to enforce respect for the maxim that foreign soil should not be a safe asylum for criminals, enemies of mankind, has commenced to formulate certain theories which are already recognized by civilized peoples. One of them is this: the country which does not give extraterritorial effect to its penal laws over its nationals and which consequently, cannot punish them in its tribunals for the crimes committed abroad, should lend itself to grant the extradition of its nationals, providing considerations of lack of reciprocity, lack of guarantees in the legislation of the demanding state, or others purely political of which the sole judge is the government of the country of asylum, do not oppose the extradition. This theory is defended with unanswerable arguments by con- [fol. 74] temporary publicists of renown, and is already sanctioned in some treaties." (Vallarta, Ch. J., in Extradition of J. M. Dominguez and F. Barrera, 1 Cuestiones Constitucionales [1879] 39).

But the main difficulty with appellants' contention that the discretionary formula is unconstitutional, is that it reflects a false conception of what "due process of law" means, and of the full scope of the treaty-making power of the general government. A treaty, according to the explicit declaration of the Constitution, is part of the supreme law of the land (Art. VI, para. 2, Constitution; Ware v. Hilton, 3 Dall. 199; Missouri v. Holland, 252 U. S. 416). The power

of the national government to enter into treaties is not limited by any express provision of the Constitution, and extends to all proper subjects of negotiation between our government and other nations (Asakura v. Seattle, 265 U. S. 332, 341; In re Ross, 140 U. S. 453, 463; Geofroy v. Riggs, 133 U. S. 258, 267). A proper subject of such negotiation is undoubtedly the extent to and conditions under which the right of a foreign government to claim fugitives from justice will be recognized and enforced. Terlinden v. Ames, 184 U. S. 270, 289. If, then, a treaty gives the Executive a discretion to deliver up a citizen, such provision, being authorized under the Constitution and a part of the supreme law of the land, does not clash in any sense with the Fifth or any other amendment. Hurtado v. California, 110 U. S. 516, 535. A contention similar to this was dealt with in Ex parte Charlton, 185 Fed. 880, affd., 229 U. S. 447, in which Judge Rellstab, in disposing of it, said:

[fol. 75] "The next contention is that, under our Constitution, the accused, being an American citizen, cannot be extradited unless there is a positive obligation on the part of the United States to surrender its citizens when accused of having committed a crime in a foreign country. To extradite, unless there is a positive obligation, is said to be contrary to the constitutional guaranty generally known as the 'due process of law' provision in our Constitution; that in a government like ours, with its constitutional limitations, no American citizen can be surrendered to another country merely out of courtesy or in a spirit of international comity.

Reduced to its last analysis, that contention, I think, is to be determined by this: Whether there is an existing treaty between the United States and Italy which requires that Charlton shall be surrendered to the demanding government. * * * If an extradition treaty subsists with a foreign government, under our Constitution and law of the land, a surrender of the prisoner in pursuance thereof would be in accordance with the 'due process of law' constitutional requirement."

Statesmen, in framing international extradition commitments, must be presumed to anticipate their consequences more or less accurately; and the courts, when inquiring into the meaning of such commitments, should consider carefully the consequences flowing from this or that construction as

the result likely to have been anticipated by the contracting parties, and should never assume that such commitments are intended to bear fruits inimical to the social order. In [fol. 76] construing Article V. we should not assume that the contracting states intended to espouse crime or encourage its impunity. This is, in effect, what appellants urge us to hold. In countries where the penal legislation crimeas personal, and punishes the citizen or subject for crimes he may commit abroad (e. g. Art. 5, Code d'Instruction Criminelle, France; Art. 7, Code Penal, Denmark; Art. 4, sec. 1, Code Penal, Poland; Art. 9, Codice Penale, Italy; Art. 12, Codigo Penal, Spain), the construction advocated by appellants might be entitled to weight; but in countries where crime is regarded as territorial and punishable only in the locus delicti, as it is here, to construe a treaty as exempting a citizen from extradition, except in the clearest case, would tend to encourage disturbances in the social order of foreign nations, and to reward the wrongdoer with impunity the moment he takes refuge in our midst. I cannot reasonably suppose that such was the intention of our government in agreeing to those provisions. Such result would constitute what Chief Justice Cockburn called a "blot upon the law." Queen v. Wilson, supra. This question gains support in Wharton, who says [1 Digest of Int. Law, 2d Ed. 1887, § 273, p. 807]:

"Where the question is one of discretion, the better rule is that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offense alleged to have been committed by such subject abroad, the extradition in such case should be refused, the asylum state then having the right of trying its own subject by its own laws. When, however, it does not assume jurisdiction of [fol. 77] extraterritorial crimes committed by its subjects, then extradition should be granted."

The judgment should be affirmed.

[fol. 77½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Ex Rel Neidecker vs. Valentine, etc. (Copy.) Dissenting opinion. Manton, Circuit Judge.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 20th day of January one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. B. COLES NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with instructions to discharge the relator.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 79] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. B. Coles Neidecker, vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 80] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

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Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. GEORGE W. NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

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Wm. Parkin, Clerk.

[fol. 81] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. George W. Neidecker vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

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Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon Harrie B. Chase, Circuit Judges.

UNITED STATES ex Rel. AUBREY NEIDECKER, Relator-Appellant,

vs.

LEWIS J. VALENTINE, Police Commissioner, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

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On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with instructions to discharge the relator.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 83] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex Rel. Aubrey Neideicker vs. Lewis J. Valentine, Police Commissioner. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1936. William Parkin, Clerk.

[fol. 84] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 83, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex Rel. B. Coles Neidecker, Relator-Appellant, against Lewis J. Valentine, Police Commissioner, etc., Defendant-Appellee (and two other cases), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighth day of February, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 85] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 804

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 86] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 805

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 87] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 806

ORDER ALLOWING CERTIORARI—Filed April 13, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 40,358, 40,359, 40,360. U. S. Circuit Court of Appeals, Second Circuit. Term No. 804. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., petitioners, vs. The United States of America, on the Relation of B. Coles Neidecker. Term No. 805. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., petitioners, vs. The United States of America, on the Relation of George W. Neidecker. Term No. 806. Lewis J. Valentine, Police Commissioner of the City of New York, et al, etc., vs. The United States of America, on the Relation of Aubrey Neidecker. Petition for writs of certiorari and exhibit thereto. Filed March 9, 1936, Term Nos. 804, O. T., 1935, 805, O. T., 1935, 806, O. T., 1935.

FILE COPY

FILED
MAR 9 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

[redacted] 6

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relator, and CHARLES DE FERRY DE FONT-NOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

[redacted] 7

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

[redacted] 8

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

THE BALLOU PRESS NEW YORK

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IN THE

Supreme Court of the United States

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relator, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

Respondent.

The same,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

Respondent.

The same,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Lewis J. Valentine, Police Commissioner of New York City, Edward T. V. Fitzgerald, and Charles de

Ferry de Fontnouvelle, Consul General of the French Republic, on behalf of the Government of the French Republic, respectfully pray for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the judgments of that Court entered in the above-entitled cases on January 20, 1936. The transcript of record, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with the Rules of this Court.

Nature of the Case.

These are three writs of habeas corpus, sued out by the relators (respondents here) to prevent their extradition to France as fugitives from justice under the Franco-American Extradition Treaty of 1909. (37 Stat. 1526; Malloy's Treaties, Vol. 3, p. 2580). The three writs were sued out at the same time and present a single question of law. The cases of the three relators were accordingly heard and decided together in the District Court, and on appeal were consolidated by order of the Circuit Court of Appeals (R. 47) and heard and decided upon one printed record.

The three relators are brothers, native-born citizens of the United States, who formerly operated in Paris an institution known as the Travelers Bank. The bank closed its doors, and the relators fled to the United States. Warrants for their arrest were issued in France; and upon their arrival here they were taken into custody by the Police Department of New York City upon a preliminary warrant (R. 14) issued by a United States Commissioner upon the sworn application (R. 10-14) of the Acting Consul General of France, pursuant to Rev. Stats. 5270 (U. S. Code, Title 18, Sec. 651) and Article IV of the Franco-American Treaty (*supra*). The Commissioner's warrant, and the application upon which it is based, charge the relators with larceny and other crimes, all of which are among the list of extraditable offenses specified in Article II of the Treaty.

Immediately upon being taken into custody, before the warrant could be returned to the Commissioner, and before any

extradition hearings could be held before him, the relators sued out writs of habeas corpus. These writs challenged the jurisdiction of the Commissioner upon the ground that *as American citizens, the relators were altogether exempt from extradition under the Treaty, and could not be held for extradition under any circumstances, no matter what the offence.* The correctness of this contention is the sole question here involved.

Upon the return of the writs the American citizenship of the relators was conceded, and the question of law arising therefrom was argued. The District Court (Hayes, J.) after hearing argument and receiving briefs, handed down an oral opinion (R. 20) sustaining the position of the French Government and directing the dismissal of the writs.

Pursuant to this opinion orders were entered (R. 31-34) dismissing the writs and remanding the relators for extradition hearings. The relators appealed; and the Circuit Court of Appeals, by a two-to-one decision (Manton, *J.* dissenting) reversed the District Court, sustained the claim of the relators to exemption from extradition, as a matter of law, upon the ground of their American citizenship, and directed their discharge. The majority opinion of the Circuit Court of Appeals is found at R. 51, the dissenting opinion at R. 57, and the judgments at R. 69-71.

The Question Presented.

The only question presented is whether the relators, because of their American citizenship, are exempt from extradition under the Treaty as a matter of law.

Article I of the Treaty provides that the two Governments

> "*mutually agree to deliver up persons,* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the

other." (Italics ours throughout this petition and brief.)

The word *"persons"* has been held by this Court to include citizens of the asylum state, as well as all others. *Charlton v. Kelly*, 229 U. S. 447.

Article V of the Treaty, however, goes on to provide:

> "Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention."

We contended below, and the District Court and the dissenting Judge in the Circuit Court of Appeals held, following two decisions of the Queen's Bench Division in England, that this language does not operate to give American citizens an absolute exemption from extradition as a matter of law, but merely renders such extradition discretionary with the Executive,—subject, of course, to a prior judicial hearing and a finding of probable cause of guilt by the magistrate, as in all extradition cases.

The relators, on the other hand, contend, and the majority of the Circuit Court of Appeals held, that the phrase "neither party *shall be bound*", must be construed as equivalent to "neither party *shall be permitted*", and that there is consequently no authority or power in either the Judiciary or the Executive to extradite American citizens to France for any crime whatever.

Reasons for Granting the Writ.

(A) No Applicable Decision by This Court.

This Court has never had occasion to decide the question here presented. The case, we submit, falls clearly within the spirit of Rule 38, and particularly of that portion which mentions cases where a Circuit Court of Appeals

> "has decided an important question of federal law which has not been, but should be, settled by this court."

(B) Importance of the Question.

If the majority of the Circuit Court of Appeals is correct, an American citizen is free to commit in France all the crimes on the calendar; and if he once succeeds in escaping to the United States, no power on earth can punish him, and he can enjoy in security the fruits of his crime. The majority of the Circuit Court of Appeals recognized this when it said (R. 56):

> "It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty."

Nor is this all. Even if the case involved merely the application of the single treaty between France and the United States, we believe that its importance would justify the granting of the writ. But the case goes much further than that. The United States now has in force no less than *thirty-two other extradition treaties, all of which contain provisions which are word for word identical with Article V of the French Treaty with respect to the extradition of citizens.** The decision of the Circuit Court of Appeals of necessity extends to all of these treaties, with the same shocking results, and the same inability to punish fugitive offenders, as is now presented in the case of France.

(C) Conflict of Authorities.

As already noted, this Court has never had occasion to decide the question here presented. In only two other instances have the lower courts in this country decided it. The English courts have twice passed upon the question, both times in

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* These treaties include: Austria, 1930; Belgium, 1901; Bolivia, 1900; Bulgaria, 1924; Chile, 1900; Columbia, 1888; Costa Rica, 1922; Cuba, 1904; Denmark, 1902; Dominican Republic, 1909; Esthonia, 1923; Finland, 1924; Germany, 1930; Greece, 1931; Honduras, 1909; Latvia, 1923; Lithuania, 1924; Luxemburg, 1883; Netherlands, 1887; Norway, 1893; Panama, 1904; Paraguay, 1913; Peru, 1899; Poland, 1927; Portugal, 1908; Rumania, 1924; Salvador, 1911; Servia, 1901; Siam, 1922; Spain, 1904; Sweden, 1893; Venezuela, 1922.

favor of our contention. The division of judicial authority may be thus summarized:

(a) *In favor of our position here* (that such language in an extradition treaty gives no absolute exemption, but renders extradition of citizens discretionary with the Executive):

(1) The District Court in the present case.

(2) The dissenting opinion in the Circuit Court of Appeals in the present case.

(3) The Queen's Bench Division (three judges) in *In re Galwey* [1896], 1 Q.B. 230.

(4) The Queen's Bench Division (three judges) in *The Queen* v. *Wilson*, 3 Q.B.D. 42 (1877).

(5) A recent unreported decision of the United States District Court for the Eastern District of Wisconsin (Geiger, J.) in *In re Drossner*,* December 7, 1935.

(b) *In favor of our opponents' position here* (that such language in a treaty gives absolute exemption as a matter of law):

(1) The majority of the Circuit Court of Appeals in the present case.

(2) The United States District Court for the Western District of Texas in *Ex parte McCabe*, 46 Fed. 363 (1891).

The above, so far as we can ascertain, comprise all of the judicial decisions which have been rendered upon this question both in this country and in England.

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* In this case the relator, an American citizen, was committed by the Commissioner for extradition to France under the same Franco-American treaty as is here involved. On *habeas corpus* he contended that he was exempt from extradition because of his American citizenship, using the same arguments as those advanced by the relators in the case at bar. The Court, after argument and briefs, rejected his argument and dismissed the writ. No opinion was written. Our information is furnished by counsel who represented the French Government in that case.

In view both of the dearth and conflict of judicial authority in this country, and of the conflict between the majority of the Circuit Court of Appeals in this case and the Queen's Bench Division in England (the latter representing the views of six Judges, including Lord Russell, C. J., Cockburn, C. J., and Kennedy, L. J.), we submit that an authoritative pronouncement by this Court is essential.

This petition is accordingly presented, not only on behalf of the petitioners of record, but also on behalf of the Government of the French Republic (whose Consul General was admitted as a party respondent in the Courts below, and is a petitioner of record here) to the end that this important question of treaty interpretation may be settled by this Court.

A brief in support of this petition is annexed hereto.

WHEREFORE, your petitioners pray that writs of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that these cases may be reviewed and determined by this Court and that the judgments of the Circuit Court of Appeals may be reversed.

Dated, New York, N. Y., March 5, 1936.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court appears at R. 20; those of the Circuit Court of Appeals at R. 51-68. Neither has been reported.

Jurisdiction.

The judgments of the Circuit Court of Appeals now sought to be reviewed were entered on January 20, 1936, and appear at R. 69-71. Jurisdiction of this Court is invoked under Section 240a of the Judicial Code (U. S. Code, Title 28, Sec. 347) and U. S. Code, Title 28, Sec. 463c.

The facts have been stated in the petition (*supra*, pp. 2-3).

ARGUMENT.

I.

The American citizenship of the relators does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive.

Article I of the Treaty contains the mutual agreement of the parties to *"deliver up persons"* who are fugitives from justice and stand charged with specified crimes. In *Charlton v. Kelly*, 229 U. S. 447, it was argued that the word "persons" must be construed to mean "persons other than citizens of the asylum state." This construction had in fact been uniformly adopted by the foreign government there involved (Italy), which had always refused to surrender its citizens to the United States. This Court, however, unanimously

rejected the argument, and held, notwithstanding the lack of reciprocity thus created, that American citizens were liable to be surrendered to Italy.

The authority to extradite is completed by the enabling statute (Rev. Stats. 5270, U. S. Code, Title 18, Sec. 651) which provides the machinery for provisional arrest, hearing before a magistrate, commitment by the magistrate, and surrender by the State Department to the representative of the demanding government. This statute by its terms comes into operation

> "whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government * * *" and when complaint is made under oath "* * * charging *any person* found within the limits of any State, District or Territory, with having committed within the jurisdiction of any foreign government any of the crimes provided for by such treaty or convention."

So far it is clear that there is no difference in status between American citizens and others; and such was the holding of this court in *Charlton* v. *Kelly, supra.*

But the relators contend that as to their persons the entire application of both Treaty and Statute is nullified by the provisions of Article V, the English and French texts of which are as follows:

"ARTICLE V.	ARTICLE V.
Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention.	Les Parties contractantes *ne seront pas obligées* de livrer leurs propres citoyens ou sujets, en vertu des stipulations du présent traité."

The question is whether this Article, when it says that neither party *"shall be bound"* to extradite its own citizens, means that neither party shall be *permitted* under any circumstances to do so, or whether it means that each party may extradite its own citizens in what it deems to be a proper

case, although it is not bound to do so under the Treaty, so that a failure to extradite cannot be regarded as a breach of the Treaty in any case involving a citizen. Our contention is simply that in the case at bar ample authority for extradition is given by both Statute and Treaty, although by the Treaty the Executive is granted a discretionary power to refuse extradition in the case of American citizens.

This has been the holding of the English courts in a precisely similar case.

In *In re Galwey* [1896], 1 Q.B. 230, a British subject was held for extradition to Belgium. The Anglo-Belgian Treaty provided, in language considerably more emphatic than that of the Franco-American Treaty:

> "In no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization."

The prisoner, relying upon this provision of the Treaty, sued out a writ of *habeas corpus*, contending that the committing magistrate had no jurisdiction under the Treaty to make an order for his extradition.

The Court, however, held to the contrary. Lord Russell, C.J. (Wright and Kennedy, JJ. concurring) said at p. 235:

> "What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

The Court accordingly held that under the language quoted it was within the discretion of the Executive whether or not to surrender a British subject, and that he was not entitled to exemption as a matter of law.

This decision, we submit, is directly applicable to the present situation. It will be remembered that in England, as here, there can be no claim of any general sovereign discretion or authority to extradite independently of treaty or statute, since it is settled law that the Crown cannot, in the absence of statutory authority, send a British subject outside

the realm for trial. *Halsbury's Laws of England,* Volume 14, page 404.

The lawful authority for extradition in England is substantially identical with that in the United States. The authority of Parliament given by the Extradition Act of 1870 (33 and 34 Vict. c. 52) corresponds to our Revised Statutes 5270 (U. S. Code, Title 18, Section 651, *supra,* p. 9). The Extradition Act, like our Statute, by its terms comes into operation only where there is an applicable Treaty; and in both countries, therefore, extradition is predicated upon the combined effect of the Statute and Treaty, the language of the Treaty being in each case the decisive factor. In *In re Galwey, supra,* as already noted, the language of the Treaty before the Court that "In no case, *nor on any consideration whatever*" should the parties be bound to surrender their own subjects, was considerably stronger for the relator than the language of the Franco-American Treaty in the case at bar; yet the Queen's Bench Division found no difficulty in holding that this Treaty gave ample authority for the extradition of a British subject.

Lord Russell in his opinion pointed out the difference between a treaty which provides that *"neither party shall be bound"* to surrender its own citizens and a treaty which provides that *"no citizen shall be surrendered"*, citing *The Queen* v. *Wilson,* 3 Q.B.D. 42 (1877).

In *The Queen* v. *Wilson,* a British subject was held for extradition to Switzerland under a treaty which provided

> "that no subject of the United Kingdom *shall be delivered up* by the Government thereof to Switzerland."

It was accordingly held in that case, in view of the language of the Treaty, that there was no authority to extradite a British subject in any event and that the Courts were bound to grant him a discharge on *habeas corpus.* The Court reached this conclusion with obvious reluctance. Cockburn, C. J., characterizing the result as "a blot upon the law." Mr. Justice Field, in his concurring opinion,

pointed out the difference between the language of the Swiss Treaty and the language of treaties which provided simply that *"neither party shall be bound"* (thus foreshadowing the later decision in *In re Galwey*), saying (3 Q.B.D. at p. 46):

> "Is there not in this very treaty an exception? It is not that one country *shall not be bound* to deliver up, but that no subject *shall be delivered up* to the other country."

Apart from the majority opinion of the Circuit Court of Appeals in the present case, the only judicial decision on either side of the Atlantic opposed to our position is that of the District Court for the Western District of Texas in *Ex parte McCabe*, 46 Fed. 363 (1891).

In that case the Court (Maxey, J.) was called upon to interpret the Mexican Extradition Treaty of 1861*, the relevant language of which was identical with that of Article V of the Franco-American Treaty above quoted. An American citizen (a woman) was charged with murder committed in Mexico. Upon being arrested and held for an extradition hearing, she immediately sued out a writ of *habeas corpus*, claiming that as an American citizen she could not lawfully be surrendered to the Mexican authorities.

The District Court sustained the writ and directed her discharge. After holding (46 Fed. at pp. 368-9) that the committing magistrate had no jurisdiction to act since there has been no complaint *on oath* as required by statute (a ground sufficient in itself to dispose of the case), the Court went on to consider the interpretation of the Treaty and the claim of American citizenship. After holding that in the absence of treaty or statutory authority there was no obligation to extradite fugitives, the Court concluded that the words "neither of the contracting parties shall be *bound* to deliver up its own citizens" meant that neither contracting party should be *permitted* to do so, that the Executive con-

* 12 Stat. 1199; Malloy's Treaties, Vol. 1, p. 1125.

sequently had no discretion to permit the surrender of an American citizen in any case, and that Mrs. McCabe was therefore entitled to discharge as a matter of right.

The Court appears to have been of the opinion that because the Mexican Treaty stated that neither party "shall be bound" to extradite its own citizens, therefore no authority for such extradition was granted by the Treaty. This, we submit, is a *non sequitur*. The Treaty itself (and this is equally applicable to the Franco-American Treaty now before us) furnishes the authority for extradition when it says (Franco-American Treaty, Article I) that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other."

Under every extradition treaty, supplemented by the enabling statute, four distinct requirements for extradition exist in every case:

1. There must be a treaty with the foreign state from which the accused is a fugitive.

2. The accused must be charged with one of the crimes provided for in that treaty.

3. A judge or magistrate must, after full hearing, determine that there is evidence sufficient to sustain the charge, and certify his findings and evidence to the Secretary of State.

4. The Secretary of State may thereupon (and not before) surrender the accused to the foreign government.

It is to be noted that under the Statute the final word on extradition is in every case with the Executive. Even after the magistrate has decided that there is evidence sufficient to warrant extradition, the Secretary of State may nevertheless refuse to surrender the culprit. Where the Treaty

obligation is unqualified (as it would be for example, in the case of a *French* citizen fleeing from France to the United States) the Secretary's refusal to surrender might constitute a breach of the Treaty, entitling the foreign Government to make diplomatic remonstrances or even to declare the Treaty at an end; but this would be the responsibility of the State Department and not of the judiciary. The present Treaty, by providing that neither party *"shall be bound"* to extradite its own citizens, means simply that the Executive may do so or not in its discretion, and that a refusal to extradite an American citizen cannot be taken as a breach of the Treaty obligations. France cannot complain that the Treaty has been broken if the Executive refuses to surrender an American citizen who has committed an extraditable offense. The citizen cannot complain that his rights have been infringed if the Executive consents to surrender him after the magistrate has certified that there is probable cause for believing him guilty. The matter is for the diplomatic discretion of the Executive.

The function of the committing magistrate, as distinguished from the Executive, is simply to determine (1) whether the offense charged is within the Treaty, and (2) whether there is probable cause sufficient to warrant the committal of the accused for trial. *Charlton* v. *Kelly,* 229 U. S. 447, 459-68; *Collins* v. *Loisel,* 259 U. S. 309, 314-15. It then becomes the duty of the Secretary of State in his discretion to decide whether extradition will be granted, notwithstanding the citizenship of the accused.

This, as already noted, has been the precise holding of the English courts upon this issue, as well as of the District Court and the minority of the Circuit Court of Appeals in the case at bar.

II.

Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend.

It is an accepted principle that treaties, particularly those relating to extradition, are to be construed in a broad and liberal sense, and that that construction is to be preferred which is the most liberal in its scope and the most likely to promote the ends of substantial justice. *Factor* v. *Laubenheimer,* 290 U. S. 276, 293, and cases there cited.

The construction for which the respondents contend is clearly narrow and restricted, and is in fundamental conflict with the fundamental purpose of the Treaty, expressed in its preamble, that the parties are "desirous to promote the cause of justice".

The argument of respondents below, and the majority opinion of the Circuit Court of Appeals, both proceeded upon the ground that the background of the Franco-American Treaty of 1909, and the practical construction claimed to have been given by the State Department, compelled the conclusion that Article V operates as a mandatory exemption of citizens, to the exclusion of all discretion or authority in either the courts or the Executive. This argument rests upon a number of items which we shall endeavor to analyze *seriatim.*

(a) *The Background of the Franco-American Treaty of 1909.*

The only previous extradition treaty with France was that of 1843 (8 Stat. 580; Malloy's Treaties, Vol. 1, p. 526.) This treaty was wholly silent on the subject of citizens, and contained an unqualified obligation to surrender all *persons.* A conflict of opinion arose, of the type apparently inevitable between countries following the civil law (where jurisdiction

over crime is personal as well as territorial) and countries following the common law (where jurisdiction over crime, with rare exceptions, is territorial only). Civil law countries generally claim the right to try their own citizens for crimes committed abroad, and on this ground are generally reluctant to extradite them. Common law countries, on the other hand, claim no jurisdiction to try their own citizens for crimes committed abroad, with the result that unless extradition is granted the crime remains unpunished. The existence of this perennial conflict is well illustrated by the arguments and diplomatic correspondence set forth in the report of *Charlton* v. *Kelly*, 229 U. S. 447.

Under the prior Franco-American Treaty, therefore, the United States was in a position to claim (according to its interpretation of such treaties, as subsequently sanctioned by this Court in *Charlton* v. *Kelly*) that France was *bound* to surrender her own citizens to us. France, on the other hand, had regularly refused to do so, pointing out that they could be punished at home.

In this posture of affairs the present Treaty was executed, containing in Article V a provision with respect to citizens which had been absent from the former treaty. The relators argue, and the Circuit Court of Appeals apparently held, that the purpose of this insertion must of necessity have been to provide for a complete surrender of the position of the United States in favor of the traditional civil law attitude, and to exempt the citizens of both parties unconditionally and absolutely from all extradition. This amounts to saying that by the change in the treaty the representatives of the United States deliberately and intentionally adopted a policy (not possible under the former treaty) of granting unconditional asylum, and immunity from all punishment, to any of its citizens who might succeed in making their escape to American soil after committing crimes in France.

The shocking results of this policy are apparent; and there are the strongest practical reasons why such results should not be reached through process of speculation, in the absence of the most compelling proof. On the contrary, we submit

that a much more reasonable assumption is that the parties desired to avoid the embarrassment which had resulted from France's refusal to surrender her own subjects under the earlier treaty, and at the same time to prevent the miscarriages of justice which would result if citizens were held absolutely exempt from extradition. With this end in view, the treaty was revised to provide that extradition on both sides should be henceforth discretionary and not mandatory.

This view finds strong support in contemporary history.

The Franco-American Treaty was signed on January 6, 1909. Only a few months before, in October 1908, an amendment had been signed to the extradition treaty between France and Great Britain, covering the question of extradition of citizens in the following language:

> "Each of the high contracting parties shall be free to refuse (sera libre de refuser) to the other the extradition of its own citizens."

Prior to that time the Franco-British Treaty had contained a flat prohibition on the extradition of citizens, which had led to the same unfortunate results as those presented in *The Queen* v. *Wilson, supra.* Oppenheim on International Law, 4th Ed. (1928), Vol. 1, p. 569.

The amendment to the British Treaty and the new American Treaty were laid before both Houses of the Frence Parliament at nearly the same time in the spring of 1909. Each was accompanied, under French parliamentary practice, by an "exposé des motifs", which is in the nature of an official introductory statement by the Government for the information of the House. In the exposé des motifs accompanying the American Treaty it was said:

> "Article V gives to the two contracting parties the right not to deliver (le droit de ne pas livrer) their nationals. This general principle which is part of our public law did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391.

In the exposé des motifs accompanying the British Treaty it was stated clearly that the modification was made, not only to permit France to be free to refuse extradition of its own citizens, but also to prevent crime from going unpunished, by giving to the British Government the right to extradite British subjects. The exposé ends by saying that the new language will—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself and thus crimes committed on our territory will no longer be liable to remain unpunished." Documents Parlementaires (1909), Sénat, Annexe 2338.

From the foregoing it is apparent that it was never the intention of France, at any rate, by language such as that contained in Article V of the present Franco-American Treaty, to *prohibit* extradition of citizens under all circumstances. On the contrary, it clearly appears to have been the understanding of France, at the time the treaty was executed, that such a clause rendered extradition in such cases discretionary.* The revision of the British and American treaties, carried out at the same time, illustrate the working of this fundamental principle under converse sets of circumstances. The British Treaty had forbidden extradition of citizens in every case. It was revised to *permit* such extradition, by language which stated simply that either party "shall be free to refuse". The earlier American Treaty had provided (according to the American interpretation at least) for an unqualified obligation to extradite citizens in all cases. It was revised to make this discretionary, by the use of the words "neither party shall be bound". In both cases the change in language was designed to reach the same result,—i.e. to make extradition of citizens possible at the discretion of the asylum state.

Viewed in this light, the Treaty of 1909 is a perfectly reasonable compromise between the conflicting views of crimi-

* French text-writers uniformly hold the same view. (*Infra*, p. 22.)

nal jurisdiction held by the parties. The existence of a discretion renders the Treaty workable and furthers the administration of justice for which it was designed. If the United States has no discretion to surrender its citizens, then a complete miscarriage of justice results, since no American courts can try them. If on the other hand a discretion exists, which is all we contend for, such miscarriages can be prevented.

(b) *The claim of "Practical Construction" by the State Department.*

We have alluded already to the decision of the District Court in *Ex parte McCabe,* rendered under the Mexican Treaty of 1861, which contained language identical with that of the Franco-American Treaty of 1909.

The Court in that case placed great reliance upon the fact that in four instances (set forth in its opinion) occurring between 1877 and 1891, the State Department had construed the language of the Mexican Treaty as prohibiting the extradition of citizens of either party.

Even if it be assumed (and there is no authority for making any such assumption) that the rulings made by the State Department some forty years ago in the case of the Mexican Treaty would be applied by the State Department at the present day to the Treaty now before the Court, the fact remains that the construction of a treaty is fundamentally for the judiciary, and that "practical construction" by the Executive, while entitled to respectful consideration, is in no sense conclusive. This is well illustrated by the decision of this Court in *United States v. Rauscher,* 119 U. S. 407, 415-16. In that case the question was whether a fugitive criminal extradited to the United States for one offense could be tried on his arrival for a different one. The State Department (see 119 U. S. at p. 415) had construed the treaty then before this Court as authorizing trial of the accused for a different offense. Arguments in support of this construction

were advanced at the bar by the Solicitor General. The British Foreign Office, on the other hand, had adopted the opposite view. This Court rejected the construction of the State Department and adopted that of Great Britain.

As pointed out in the dissenting opinion in the Circuit Court of Appeals in the case at bar (R. 63-4), the construction by the State Department upon which the Court relied in *Ex parte McCabe, supra,* was the exact opposite of that which had been adopted, with respect to the same treaty, by the Supreme Court of Mexico and apparently also by the Mexican Foreign Office. It led to such embarrassment that in 1899, when a new Treaty* was negotiated with Mexico, the disputed article was changed to read as follows:

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, *but the Executive authority of each shall have the power to deliver them up, if, in its discretion, if be deemed proper to do so.*" (Art. IV.)

Substantially similar language is found in six other extradition treaties†.

Upon this alteration of the Mexican Treaty the majority of the Circuit Court of Appeals in the present case bases a further argument, which in effect is this: At the time the Franco-American Treaty was negotiated in 1909, the parties had before them the precedent of the Mexican amendment of 1899, which contained an express grant of discretion; and their failure to incorporate the same express grant in the Franco-American Treaty compels the conclusion that they intended deliberately to exclude discretion.

We submit, however, that the insertion of express words stating that the parties *may* surrender their own citizens although they are not *bound* to do so adds nothing to the force of the Treaty, and that these words have been inserted on occasion simply from an abundance of caution on the part

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* 31 Stat. 1818; Malloy's Treaties, Vol. 1, p. 1184.

† Japan, 1886; Argentina, 1896; Orange Free State, 1896; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905.

of the draftsman.* The Anglo-Belgian Treaty which was before the Court in *In re Galwey, supra,* contained no such provision. Its language on its face stated unequivocally and without qualification that neither party *"shall be bound"* to extradite its own citizens; yet the Queen's Bench Division had no difficulty in holding that these words implied the existence of a discretionary power. Mr. Justice Field in *The Queen* v. *Wilson, supra,* was of the same opinion.

When the parties met to negotiate the Franco-American Treaty of 1909, they had before them, as already noted, a prior treaty under which the United States was unequivocally bound to surrender its citizens to France. No cases had arisen, similar to those arising with respect to Mexico, of American citizens committing crimes in France and returning to remain unpunished in the United States. There is nothing to indicate that either the rulings of the State Department some twenty years earlier on the Mexican Treaty, or the decision of Judge Maxey in *Ex parte McCabe,* were present in the mind of either party at the time the French Treaty was negotiated.

Textwriters on international law have classified extradition treaties under three heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state (such as our present Treaty with Great Britain, our former treaty with France, and the Treaty with Italy which was before this Court in *Charlton* v. *Kelly*);

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"

---

* As stated in the dissenting opinion in the present case, the reason for the amendment of the Mexican Treaty in 1899

> "was merely to clear up doubts, cast upon the plain meaning of the provisions of Article VI of the 1861 Convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the McCabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 Convention. It adds nothing, because where the country *is not bound* but *may* surrender, discretion is necessarily implied." (R. 65.)

(such as the Anglo-Swiss Treaty which was before the Court in *The Queen* v. *Wilson*);

3. Those which give to the asylum state a discretion to surrender its own citizens or not, as the Executive may decide in each case.

The present Franco-American Treaty, and other treaties containing similar language, are regularly classified by modern authorities under the third of these categories, along with treaties which, like the Mexican treaty above quoted, contain express words of discretion. *Oppenheim on International Law* (4th Ed. 1928), Vol. I, p. 569; *Saint Aubin—L'extradition et le droit extraditionnel* (1913) Vol. 1, p. 309; *Travers—Droit Pénal International* (1922) Vol. V, p. 28; Travers—*L'Entraide repressive internationale et la loi française du 10 Mars 1927* (1928) pp. 169-70.

(c) *The alleged distinction between the present case and In re Galwey, supra.*

Upon its face the decision of the Queen's Bench Division in *In re Galwey* is clearly an authority for our contentions. The majority of the Circuit Court of Appeals, however, refused to follow it upon the ground that the circumstances under which that decision was rendered were different from those here involved. We quote from the majority opinion as follows (R. 54):

"A ruling of an English court, (In Re Galway (1896) 1 Q.B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. Regina v. Wilson, 3 Q.B. 42. In that year it was amended and what we have called the Prussian clause [i.e.—a clause similar to that contained in the Franco-American Treaty] was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that

is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred."

Obviously the amendment to the Anglo-Belgian Treaty in the *Galwey* case had to be given some meaning. It is equally obvious that the language of the new Franco-American Treaty here must be given some meaning, and that the parties intended to make *some* change from the earlier language of the 1843 treaty. But there is no authority whatever for assuming that the change which the parties intended was that which the Circuit Court of Appeals has held—i.e. a change from an absolute obligation to surrender citizens in every case to an absolute prohibition against surrendering them at all.

If *that* had been the intention of the parties, they could easily have expressed it by incorporating in the 1909 treaty a clause such as that which had been presented in *The Queen* v. *Wilson, supra,* to the effect that:

"No citizen of either party *shall be surrendered.*"

Or they could have followed the precedent of Art. XXIV of the treaty between the United States and the Two Sicilies of 1855* (the only American treaty of the kind), which provided that:

"The citizens and subjects of each of the High Contracting Parties *shall remain exempt* from the stipulations of the preceding articles."

Or they could have copied, in Article V of the Franco-American treaty, the mandatory wording used in Articles VI and VIII of the very same treaty, which clearly exclude all discretion with respect to extradition for political offenses

* 11 Stat. 639, 653; Malloy's Treaties, Vol. 2, p. 1814, 1822.

and those barred by the statute of limtations (*infra,* pp. 24-25).

But the parties did nothing of the kind. Instead, they adopted language which, on its face, certainly shows no intention to confer an absolute exemption. Not only is there no authority for saying that any such intention existed; but on the contrary, as pointed out above (*supra,* pp. 16-19), it is far more reasonable to assume that the new language represented a compromise between the views of the two parties, and that the change was from an absolute and unqualified obligation to surrender citizens in all cases to a qualified or discretionary obligation to do so or not, as the Executive might deem fit.

III.

A comparison of the discretionary language of Article V of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument.

We may further distinguish the discretionary language that a party "shall not be bound" to surrender its own citizens with the language regularly used in other phases of extradition treaties when it is intended that a particular subject should be completely excluded from the operation of the treaty and no opportunity left for discretion.

In nearly all extradition treaties, there is found in the same document the discretionary provision that neither party *"shall be bound"* to extradite its own citizens and also the mandatory provision that extradition *"shall not be granted"* in specified cases, such as those involving political offenses, offenses barred by the Statute of Limitations, offenses committed prior to the Treaty, etc. Thus in the

Franco-American Treaty of 1909, now before the Court, we find:

> Art. V—Neither party *"shall be bound"* to extradite its own citizens.
>
> Art. VI—Fugitive criminals *"shall not be surrendered"* for political offenses.
>
> Art. VIII—Extradition *"shall not be granted"* where prosecution is barred by the Statute of Limitations of the asylum state.

The contrast between the mandatory and discretionary language of the two types is clearly apparent.

In nearly every extradition treaty ever concluded by the United States, the same contrast is present. Thus in Article III of the Treaty with Brazil of 1897 (33 Stat. 2091; Malloy's Treaties, Vol. 1. p. 148) it is provided:

> "Extradition *shall not be granted* if the offense on which the surrender is demanded be of a political character."

Article V of the same Treaty provides:

> "The contracting parties *shall in no case be obliged* to surrender their own citizens in virtue of the stipulations of the present treaty."

And Article VIII of the same Treaty provides that extradition *"shall be refused"* where prosecution is barred by the Statute of Limitations of the asylum state.

Other examples could be multiplied indefinitely.

CONCLUSION.

It is accordingly respectfully submitted that writs of certiorari should be granted to the end that the decision of the Circuit Court of Appeals may be reversed and the relators remanded for the purpose of extradition hearings according to law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 6, 7 and 8.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONT-NOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

FRANK L. POLK,
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IN THE

Supreme Court of the United States

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic, Petitioners, against UNITED STATES on the Relation of B. COLES NEIDECKER, Respondent.	October Term, 1936. Nos. 6, 7 and 8.
The Same, Petitioners, against UNITED STATES on the Relation of GEORGE W. NEIDECKER, Respondent.	
The Same, Petitioners, against UNITED STATES on the Relation of AUBREY NEIDECKER, Respondent.	

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court is unreported, and appears at R. 12; that of the Circuit Court of Appeals is re-

ported in 81 F. (2d) 32, and appears at R. 31. This Court granted certiorari on April 13, 1936, 298 U. S., 80 L. Ed. 674.

Jurisdiction.

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on January 20, 1936, and appear at R. 49-51. Jurisdiction of this Court is invoked under Section 240a of the Judicial Code (U. S. Code, Title 28, Sec. 347) and U. S. Code, Title 28, Sec. 463c.

Nature of the Case.

These are three writs of habeas corpus sued out by the respondents (relators below) to prevent their extradition to France as fugitives from justice under the Franco-American Extradition Treaty of 1909 (37 Stat. 1526; Malloy's Treaties, Vol. 3, p. 2580). The three writs were sued out at the same time and present a single question of law. All three cases were heard and decided together in the District Court, and on appeal were consolidated by order of the Circuit Court of Appeals (R. 27) and heard and decided upon one printed record.

The three respondents are brothers, native-born citizens of the United States, who formerly operated in Paris an institution known as the Travelers Bank. The Bank closed its doors, and the respondents fled to the United States. Warrants for their arrest were issued by the proper authorities in France. Upon the arrival of the respondents in this country, they were taken into custody by the Police Department of New York City upon a preliminary warrant (R. 9) issued by a United States Commissioner upon the sworn application (R. 6-9) of the Acting Consul General of France, pursuant to Rev. Stats. 5270 (U. S. Code, Title 18, Sec. 651) and Article IV of the Franco-American Extradition Treaty *(supra)*. The Commissioner's warrant, and the application upon which it is based, charged the respondents with larceny

and other crimes, all of which are among the list of extraditable offenses as specified in Article II of the Treaty.

Immediately upon being taken into custody, before the warrant could be returned to the Commissioner, and before any extradition hearings could be held by him, the respondents sued out writs of habeas corpus (R. 2-5). These writs challenged the jurisdiction of the Commissioner upon the ground that *the respondents, by reason solely of their American citizenship, were altogether exempt as a matter of law from extradition under the Treaty, and could not be arrested or held for extradition under any circumstances, no matter what the offense.* The correctness of this contention is the sole question here involved.

The respondents to the writs of habeas corpus were the Police Commissioner of New York City and one of his subordinates. The acting French Consul General was admitted as an intervening party respondent by order of the District Court (not printed in the Record on Appeal). His successor in office, the present Consul General, was substituted by order of the Circuit Court of Appeals (R. 29).

Upon the return of the writs, the American citizenship of the respondents was conceded, and the question of law arising therefrom was argued. The District Court (Hayes, J.) after hearing argument and receiving briefs, handed down an oral opinion (R. 12) sustaining the position of the French Government and directing the dismissal of the writs.

Pursuant to this opinion, orders were entered (R. 20-21) dismissing the writs and remanding the respondents for extradition hearings. They appealed; and the Circuit Court of Appeals, by a two-to-one decision (Manton, J. dissenting), reversed the District Court, sustained the claim of the respondents to exemption from extradition as a matter of law, upon the ground of their American citizenship, and directed their discharge. The majority opinion of the Circuit Court of Appeals is found at R. 31, the dissenting opinion at R. 37, and the judgments at R. 49-51.

Certiorari was granted upon a petition which set forth:

(a) That an important question of Federal law was presented, which had never been decided by this Court,

(b) That the question was of wide application, involving not only the interpretation of the Franco-American Extradition Treaty, but also the interpretation of some thirty-two other treaties containing identical language,

(c) That there was a conflict of authority between the decision of the Circuit Court of Appeals (the only appellate tribunal in this country which has passed upon the question) and other decisions,—particularly those of the English courts.

The Question Presented.

Article I of the Treaty provides that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other." (Italics ours throughout this brief.)

The word "*persons*" has been held by this Court to include citizens of the asylum state, as well as all others. *Charlton* v. *Kelly*, 229 U. S. 447.

Article V of the Treaty, however, goes on to provide:

> "Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention."

We contended below, and the District Court and the dissenting Judge in the Circuit Court of Appeals held, following two decisions of the Queen's Bench Division in England, that this language does not operate to give American citizens an absolute exemption from extradition as a matter of law, but merely renders such extradition discretionary with the Execu-

tive,—subject, of course, to a prior judicial hearing and a finding of probable cause of guilt by the magistrate, as in all extradition cases.

The respondents, on the other hand, contend, and the majority of the Circuit Court of Appeals held, that the phrase "neither party *shall be bound*", must be construed as equivalent to "neither party *shall be permitted*", and that there is consequently no authority or power in either the Judiciary or the Executive to extradite American citizens to France for any crime whatever.*

Summary of Argument.

I. The American citizenship of the respondents does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive, after other requirements (arrest, hearing before a magistrate, proof of guilt, etc.) have been met. (*Infra*, pp. 6-14).

II. The construction for which respondents contend is repugnant to justice and contrary to accepted principles governing the interpretation of treaties. (*Infra*, pp. 14-16).

III. Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend. On the contrary, the reasonable interpretation, borne out by contemporaneous legislative history, on the French side at least, shows that it was the intention to render extradition discretionary, rather than to exclude it altogether. (*Infra*, pp. 16-22).

IV. The claim of "practical construction" of the Treaty in favor of the respondents is unfounded. (*Infra*, pp. 22-32).

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*The present case is discussed, and the opinion of the majority of the Circuit Court of Appeals adversely criticized, in 49 Harvard Law Review 1003 (April, 1936) and 30 American Journal of International Law 480 (July, 1936).

V. The Franco-American Treaty, and other treaties containing similar language, have regularly been interpreted by textwriters as conferring a discretion on the Executive. (*Infra,* pp. 33-35).

VI. A comparison of the discretionary language of Article II of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument. (*Infra,* pp. 35-37. See also classification of treaties in Appendix A, p. 40).

VII. There is no distinction between the case at bar and the decision of the Queen's Bench Division in *In re Galwey,* [1896], 1 Q. B. 230. The reasoning of that decision is sound, and should be followed. (*Infra,* pp. 37-39).

ARGUMENT.

I. The American citizenship of the respondents does not bar their extradition as a matter of law, but renders that extradition discretionary with the Executive.

Article I of the Treaty contains the mutual agreement of the parties to *"deliver up persons"* who are fugitives from justice and stand charged with specified crimes. In *Charlton* v. *Kelly,* 229 U. S. 447 is was argued that the word "persons" must be construed to mean "persons other than citizens of the asylum state." This construction had in fact been uniformly adopted by the foreign government there involved (Italy), which had always refused to surrender its citizens to the United States. This Court, however, unanimously rejected the argument, and held, notwithstanding the lack of reciprocity thus created, that American citizens were liable to be surrendered to Italy.

The authority to extradite is completed by the enabling statute (Rev. Stats. 5270, U. S. Code, Title 18, Sec. 651) which provides the machinery for provisional arrest, hearing before a magistrate, commitment by the magistrate, and surrender by the State Department to the representative of the demanding government. This statute by its terms comes into operation

> "whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government * * *"
>
> and when complaint is made under oath
>
> "* * * charging *any person* found within the limits of any State, District or Territory, with having committed within the jurisdiction of any foreign government any of the crimes provided for by such treaty or convention."

So far it is clear that there is no difference in status between American citizens and others; and such was the holding of this Court in *Charlton* v. *Kelly, supra.*

But the respondents contend that as to their persons the entire application of both Treaty and Statute is nullified by the provisions of Article V, the English and French texts of which are as follows:

"ARTICLE V.	ARTICLE V.
Neither of the contracting Parties *shall be bound* to deliver up its own citizens or subjects under the stipulations of this convention.	Les Parties contractantes *ne seront pas obligées* de livrer leurs propres citoyens ou sujets, en vertu des stipulations du présent traité."

The question is whether this Article, when it says that neither party *"shall be bound"* to extradite its own citizens, means that neither party shall be *permitted* under any circumstances to do so, or whether it means that each party may extradite its own citizens in what it deems to be a proper case, although it is not unqualifiedly bound to do so, so that a failure to extradite cannot be regarded as a breach of the

Treaty in any case involving a citizen. Our contention is simply that in the case at bar ample authority for extradition is given by both Statute and Treaty, although by the Treaty the Executive is granted a discretionary power to refuse extradition in the case of American citizens.

This has been the holding of the English courts in a precisely similar case.

In *In Re Galwey*, [1896], 1 Q. B. 230, a British subject was held for extradition to Belgium. The Anglo-Belgian Treaty provided, in language considerably more emphatic than that of the Franco-American Treaty:

> *"In no case, nor on any consideration whatever,* shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization."

The prisoner, relying upon this provision of the Treaty, sued out a writ of *habeas corpus,* contending (as the respondents do here) that the committing magistrate had no jurisdiction under the Treaty to make an order for his extradition.

The Court, however, held to the contrary. Lord Russell, C. J. (Wright and Kennedy, J J. concurring) said at p. 235:

> "What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition."

The Court accordingly held that under the language quoted it was within the discretion of the Executive whether or not to surrender a British subject, and that he was not entitled to exemption as a matter of law.

This decision, we submit, is directly applicable to the present situation. It will be remembered that in England, as here, there can be no claim of any general sovereign discretion or prerogative to extradite independently of treaty or statute, since it is settled law that the Crown cannot, in the absence of statutory authority, send a British subject outside the

realm for trial. *Halsbury's Laws of England,* (1910 ed.) Vol. 14, p. 404. Indeed, the act of sending any British subject outside the realm without authority of statute, under Section 11 of the Habeas Corpus Act of 1679 (31 Car. II, c. 2) renders all persons concerned guilty of a *praemunire,* the penalty for which is imprisonment for life, and which under the Habeas Corpus Act is incapable of being pardoned by the Crown. Cf. *R.* v. *Home Secretary: Ex parte O'Brien,* [1923], 2 K. B. 361.

The lawful authority for extradition in England is substantially identical with that in the United States. The authority of Parliament given by the Extradition Act of 1870 (33 and 34 Vict. c. 52) corresponds to our Revised Statutes 5270 (U. S. Code, Title 18, Section 651, *supra,* p. 7). The Extradition Act, like our Statute, by its terms comes into operation only where there is an applicable Treaty; and in both countries, therefore, extradition is predicated upon the combined effect of the Statute and Treaty, the language of the Treaty being in each case the decisive factor. In *In re Galwey, supra,* as already noted, the language of the Treaty before the Court that "In no case, *nor on any consideration whatever*" should the parties be bound to surrender their own subjects, was considerably stronger for the relator than the language of the Franco-American Treaty in the case at bar; yet the Queen's Bench Division found no difficulty in holding that this Treaty gave ample authority for the extradition of a British subject.

Lord Russell in his opinion pointed out the difference between (1) a treaty which provides that *"neither party shall be bound"* to surrender its own citizens, and (2) a treaty which provides that *"No citizen shall be surrendered",* citing *R.* v. *Wilson,* 3 Q. B. D. 42 (1877).

In *R.* v. *Wilson,* a British subject was held for extradition to Switzerland under a treaty which provided

> "that no subject of the United Kingdom *shall be delivered up* by the Government thereof to Switzerland."

It was accordingly held in that case, in view of the language of the Treaty, that there was no authority to extradite a British subject in any event, and that the Courts were bound to grant him a discharge on *habeas corpus*. The Court reached this conclusion with obvious reluctance, Cockburn C. J., characterizing the result as "a blot upon the law". Field, J., in his concurring opinion pointed out the difference between the language of the Swiss Treaty and the language of treaties which provided simply that *"neither party shall be bound"* (thus foreshadowing the later decision in *In re Galwey*), saying (3 Q. B. D. at p. 46):

> "Is there not in this very treaty an exception? It is not that one country *shall not be bound* to deliver up, but that no subject *shall be delivered up* to the other country."

The effect of *In re Galwey* and *R.* v. *Wilson* is thus summarized in *Piggott on Extradition* (1910), the standard English textbook on the subject, at page 66:

> "The surrender of subjects was considered in *In re Galwey*, in the case of a fugitive about to be surrendered to Belgium. In the original treaty with that country subjects were excluded from its provisions. But in 1887, a new treaty was concluded, in which the following clause was inserted:
>
> > In no case, nor on any consideration whatever, shall the High Contracting Parties be bound to surrender their own subjects, whether by birth or naturalization.
>
> The point was taken, probably on account of the somewhat superfluous words in the article, that a British subject was not liable to be surrendered at all. The Court held that as neither country was bound to surrender its subjects, they might be surrendered, and that this was a question for the Secretary of State with which the Courts had nothing to do. Lord Russell intimated in his opinion that the Secretary of State might exercise his discretion at any stage, even after he had given his

> preliminary, or presumably his final order. The decision in *R.* v. *Wilson* was approved, where possible variations in language had already been pointed out by Field, J.: 'It is not [in the treaty with Switzerland] that one country shall not be bound to deliver up, but that no subject shall be delivered up".

Apart from the majority opinion of the Circuit Court of Appeals in the present case, the only judicial decision on either side of the Atlantic opposed to our position is that of the District Court for the Western District of Texas in *Ex parte McCabe,* 46 Fed. 363 (1891).*

In that case the Court (Maxey, J.) was called upon to interpret the Mexican Extradition Treaty of 1861, the relevant language of which was identical with that of Article V of the Franco-American Treaty above quoted. An American citizen (a woman) was charged with murder committed in Mexico. Upon being arrested and held for an extradition hearing, she immediately sued out a writ of *habeas corpus,* claiming that as an American citizen she could not lawfully be surrendered to the Mexican authorities.

The District Court sustained the writ and directed her discharge. After holding (46 Fed. at pp. 368-9) that the committing magistrate had no jurisdiction to act since there had been no complaint *on oath* as required by statute (a ground sufficient in itself to dispose of the case), the Court went on to consider the interpretation of the Treaty and the claim of American citizenship. After pointing out (quite correctly) that in the absence of treaty or statutory authority there was

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* The only other American decision on the point of which we are aware is a recent unreported case in the United States District Court for the Eastern District of Wisconsin (Geiger, J.). *In Re Drossner,* Dec. 7, 1935. In that case, the relator, an American citizen, was committed by a United States Commissioner, after hearings, for extradition to France under the same treaty as is here involved. On habeas corpus, he contended that he was exempt from extradition, because of his American citizenship, using the same arguments as those advanced by the respondents here. The Court, after argument and briefs, rejected his claim and dismissed the writ. No opinion was written. Our information is furnished by counsel who represented the French Government in that case.

no obligation to extradite fugitives, the Court concluded that the words "neither of the contracting parties shall be *bound* to deliver up its own citizens" meant that neither contracting party should be *permitted* to do so, that the Executive consequently had no discretion to permit the surrender of an American citizen in any case, and that Mrs. McCabe was therefore entitled to discharge as a matter of right.

The Court appears to have been of the opinion that because the Mexican Treaty stated that neither party "shall be bound" to extradite its own citizens, therefore no authority for such extradition was granted by the Treaty. This is clearly a *non sequitur*. The Treaty itself (and this is equally applicable to the Franco-American Treaty now before us) furnishes the authority for extradition when it says (Franco-American Treaty, Article I) that the two Governments

> "*mutually agree to deliver up persons* who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other."

Under every extradition treaty, supplemented by the enabling statute, there are four distinct elements necessary for every extradition:

1. There must be a treaty with the foreign state from which the accused is a fugitive.

2. The accused must be charged with one of the crimes provided for in that treaty.

3. A judge or magistrate must, after full hearing, determine that there is evidence sufficient to sustain the charge, and certify his findings and evidence to the Secretary of State.

4. The Secretary of State may thereupon (and not before) surrender the accused to the foreign government.

It is to be noted that under the Statute the final word on extradition is in every case with the Executive. Even after the magistrate has decided that there is evidence sufficient to warrant extradition, the Secretary of State may nevertheless refuse to surrender the culprit.

17 Opinions of the Attorney-General, 184;
In re Palmer, Fed. Cas. No. 10,679.

Where the Treaty obligation is unqualified (as it would be for example, in the case of a French citizen fleeing from France to the United States) the Secretary's refusal to surrender might constitute a breach of the Treaty, entitling the foreign Government to make diplomatic remonstrances or even to declare the Treaty at an end; but this would be the responsibility of the State Department and not of the judiciary. The present Treaty, by providing that neither party *"shall be bound"* to extradite its own citizens, means simply that the Executive may do so or not in its discretion, and that a refusal to extradite an American citizen cannot be taken as a breach of the Treaty obligations. France cannot complain that the Treaty has been broken if the Executive refuses to surrender an American citizen who has committed an extraditable offense. The citizen cannot complain that his rights have been infringed if the Executive consents to surrender him after the magistrate has certified that there is probable cause for believing him guilty. The matter is for the diplomatic discretion of the Executive.

The function of the committing magistrate, as distinguished from the Executive, is simply to determine (1) whether the offense charged is within the Treaty, and (2) whether there is probable cause sufficient to warrant the committal of the accused for trial. *Charlton* v. *Kelly,* 229 U. S. 447, 459-68; *Collins* v. *Loisel,* 259 U. S. 309, 314-15. It then becomes the duty of the Secretary in his discretion to decide whether extradition will be granted, notwithstanding the citizenship of the accused.

This, as already noted, has been the precise holding of the English courts upon this issue, as well as of the District Court and the dissenting Judge of the Circuit Court of Appeals in the case at bar.

II. The construction for which respondents contend is repugnant to justice and contrary to accepted principles governing the interpretation of treaties.

It is an accepted principle that treaties are to be construed in a broad and liberal sense, and that that construction is to be preferred which is the most liberal in its scope and the most likely to promote the ends of substantial justice. In *Factor* v. *Laubenheimer,* 290 U. S. 276, this Court said at page 293:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Geofroy* v. *Riggs,* 133 U. S. 258, 271; *In re Ross,* 140 U. S. 453, 475; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437; *Asakura* v. *Seattle,* 265 U. S. 332."

And at page 298:

> "Other considerations peculiarly applicable to treaties for extradition, and to these treaties in particular, fortify this conclusion. The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as

> criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 More, Extradition, § 40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. *Grin* v. *Shine*, 187 U. S. 181, 184; *Yordi* v. *Nolte*, 215 U. S. 227, 230."

The construction for which respondents contend is clearly narrow and restricted and is in fundamental conflict with the purpose of the Treaty, expressed in its preamble, that the parties are "desirous to promote the cause of justice."

Respondents, of necessity, must go to the extent of saying that any American citizen is free to commit in France all the crimes on the calendar, and that if he once succeeds in escaping to the United States, no power on earth can punish him, and he can enjoy in security the fruits of his crime. No Court in this country can punish him for an offense committed abroad; and upon respondents' contention, there is no power in either the Judiciary or the Executive to surrender him to the country from which he has fled. The shocking injustice of such a result is only too apparent.

The majority of the Circuit Court of Appeals recognized this when they said in their opinion (R. 36):

> "It is indeed unfortunate that there should be no way by which the relators can be punished, if they are guilty."

But this is not all. The application of the present argument extends far beyond the single treaty which is now before this Court. The United States now has in force *no less than thirty-two other extradition treaties, all of which contain provisions which are word for word identical with Article V of the French Treaty with respect to the extradition of citizens.**

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*See list and analysis of these treaties, *infra*, Appendix A, page 42.

If respondents, and the majority of the Circuit Court of Appeals in the instant case, are correct in their reasoning, then American citizens in every one of these countries may commit all manner of crimes with the same immunity as is now claimed by the respondents in respect of crimes committed in France.

To this we can only answer in the words of this Court (*Neely* v. *Henkel*, 180 U. S. 109, 123):

> "We are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the county whose laws he has violated and from whose justice he has fled."

III. Nothing in the situation of the parties or the background of the Treaty compels the interpretation for which respondents contend.

The argument of respondents below, and the majority opinion of the Circuit Court of Appeals, both proceeded upon the theory that the history and background of the Franco-American Treaty of 1909 compelled the conclusion that Article V was intended to operate as a mandatory exemption of citizens, to the exclusion of all discretion or authority in either the courts or the Executive. This argument we believe to be unsound.

Let us examine first the history of the Treaty.

The only previous treaty with France on the subject of extradition was that of 1843 (8 Stat. 580; Malloy's Treaties, Vol. I, p. 526). This treaty was wholly silent on the subject of citizens and contained an unqualified obligation to surrender all *persons*. A conflict of opinion arose, of the type apparently inevitable between countries following the civil law (where jurisdiction over crime is personal as well as territorial) and countries following the common law (where

jurisdiction over crime, with rare exceptions, is territorial only). Civil law countries generally claim the right to try their own citizens for crimes committed abroad, and on this ground are generally unwilling to extradite them. Common law countries, on the other hand, claim no jurisdiction to try their own citizens for crimes committed abroad, with the result that unless extradition is granted the crime remains unpunished. The existence of this perennial conflict is well illustrated by the arguments and diplomatic correspondence set forth in the report of *Charlton* v. *Kelly*, 229 U. S. 447. *Cf. American Journal of International Law*, 1935 Supplement, page 123 (dealing with the proposed Draft Convention on Extradition).

Under the prior Franco-American Treaty, therefore, the United States was in a position to claim (according to its interpretation of such treaties, as subsequently sanctioned by this Court in *Charlton* v. *Kelly*) that France was bound to surrender her own citizens to us. France on the other hand had regularly refused to do so, pointing out that they could be punished at home.

In this posture of affairs the present Treaty was executed, containing in Article V a provision with respect to citizens which had been absent from the former treaty. The respondents argue, and the Circuit Court of Appeals apparently held, that the purpose of this insertion must of necessity have been to operate as a complete surrender of the position of the United States in favor of the traditional civil law attitude, and to exempt the citizens of both parties unconditionally and absolutely from all extradition. This amounts to saying that by the change in the treaty the United States deliberately and intentionally adopted a policy (not possible under the former treaty) of granting unconditional asylum, and immunity from all punishment, to any of its citizens who might succeed in making their escape from France after committing crimes abroad.

The shocking results of such an argument are plain, and there are the strongest practical reasons why such results should not be reached through process of speculation, in the

absence of the most compelling proof. Obviously neither party, in drafting the treaty, had any idea, or any desire, that its effect would be to render one party impotent to punish crimes committed on its own territory, or to make the territory of the other a safe haven for returning native-born criminals. On the contrary, a much more reasonable assumption is that the parties desired to avoid the embarrassment which had resulted from France's refusal to surrender her own subjects under the earlier treaty, and at the same time to prevent the miscarriages of justice which would result if citizens were held absolutely exempt from extradition. With this end in view, the treaty was revised to provide that extradition on both sides should be henceforth discretionary and not mandatory.

This view finds strong support in the legislative history of the treaty.

The Franco-American Treaty was signed on January 6, 1909. Only a few months before, in October, 1908, an amendment had been signed to the extradition treaty between France and Great Britain, covering the extradition of citizens in the following language:

> "Each of the High Contracting Parties shall be at liberty to refuse (sera libre de refuser) to the other the extradition of its own nationals." (Hertslet's Commercial Treaties, Vol. XXV, p. 336, Art. 2).

Prior to that time the Franco-British Treaty had contained a flat prohibition upon the extradition of citizens, which had led to the same unfortunate results as those presented in *R.* v. *Wilson, supra.* (Treaty of August 14, 1876, Art. 2, Hertslet, Vol. XIV, pp. 359, 360); *cf. Oppenheim on International Law,* 4th ed. (1928), Vol. I, page 569).

The amendment to the British Treaty and the new American Treaty were laid before both Houses of the French Parliament at the same time in the spring of 1909. Each was accompanied, under French parliamentary practice, by an "exposé des motifs", which is in the nature of an official introductory statement by the Government for the informa-

tion of the House. In the exposé des motifs accompanying the American Treaty it was said:

> "Article V gives to the two contracting parties the right not to deliver (le droit de ne pas livrer) their nationals. This general principle, which is part of our public law, did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391.

In the exposé des motifs accompanying the British Treaty it was stated clearly that the modification was made, not only to permit France to be free to refuse extradition of its own citizens, but also to prevent crime from going unpunished, by giving to the British Government the right to extradite British subjects. The exposé ends by saying that the new language will—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself; and thus crimes committed on our territory will no longer be liable to remain unpunished." Documents Parlementaires (1909), Sénat, Annexe 2338.

From the foregoing it is apparent that it was never the intention of France, at any rate, by language such as that contained in Article V of the present Franco-American Treaty, to *prohibit* extradition of citizens under all circumstances. On the contrary, it clearly appears to have been the understanding of France, at the time the treaty was executed, that such a clause rendered extradition in such cases discretionary.* The revision of the British and American treaties, carried out at the same time, illustrate the working of this fundamental principle under converse sets of circumstances. The British Treaty had forbidden extradition of citizens in every case. It was revised to *permit* such extra-

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* French textwriters uniformly hold the same view. (*infra*, p. 33).

dition, by language which stated simply that either party "shall be free to refuse." The earlier American Treaty had provided (according to the American interpretation at least) for an unqualified obligation to extradite citizens in all cases. It was revised to make this discretionary, by the use of the words "neither party shall be bound." In both cases the change in language was designed to reach the same result,—i. e. to make extradition of citizens possible at the discretion of the asylum state.

Viewed in this light, the Treaty of 1909 between France and the United States, and the almost contemporaneous amendment of the Treaty between France and Great Britain, represent a perfectly reasonable compromise between two conflicting views of criminal jurisdiction;* and the French legislative history shows that this was precisely what the parties intended.

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* At the time the Treaty of 1909 was negotiated, while it appears to have been the general practice of the French executive authorities to decline to extradite French subjects, the French law contained no prohibition upon such extradition. On the contrary, there was until 1927 express statutory authority for it, under the Decrees of Napoleon I of October 23, 1811, December 20, 1812, and February 25, 1813. See Bernard, *Traité Theorique et Pratique de l'Extradition*, (2nd ed. 1890) Vol. II, p. 106 *et seq.*; Bonafos, *de l'Extradition*, 103.

The first statutory prohibition upon the extradition of French subjects is found in Article 3 of the French Law of Extradition of March 10, 1927; but under Article 1 of the same Law, it is provided that the statute is to apply only in the absence of a treaty, so that even this statute does not necessarily prohibit extradition of French citizens under the Franco-American Treaty. Cf. Travers, *"L'Entraide Repressive Internationale et la Loi Française du 10 Mars 1927"*, (1928) pp. 169 & 170.

The status of the French domestic law as it existed at the time of the Treaty is in any event immaterial, in view of the decision of this Court in *Charlton* v. *Kelly*, *supra*. In that case there was involved the Italian Treaty of 1868. It was shown that it had been the invariable practice of Italy since long prior to 1868 to refuse the extradition of Italian subjects in every case. It was also shown that the Italian Government itself, in cases arising under the treaty between 1868 and 1890, had taken the position that Italian "common law" absolutely forbade the extradition of Italian citizens. This "common law" was codified and reaffirmed in the Italian Penal Code of 1890. Nevertheless, this Court sustained the practice of surrendering American citizens to Italy, notwithstanding the fact that Italy, in the face of its treaty obligations, uniformly refused to reciprocate.

The necessity for some such compromise will continue so long as civil law countries insist that their judges should have the exclusive right to punish their own citizens for crimes committed anywhere on the face of the earth, while common law countries insist, with equal force, that their juries cannot punish anyone for crimes committed outside the limits of the vicinage. The existence of Executive discretion renders the Treaty workable and furthers the administration of justice for which it was designed. If the United States has no discretion or power to surrender its citizens, then a complete miscarriage of justice results, since no American court can try them. If, on the other hand, a discretion exists—which is all we contend for,—such miscarriages can be prevented.

If it be objected that this construction may not in practice result in strict reciprocity, or that it would derogate from the dignity of the United States to surrender its citizens unless assured in advance that civil-law countries would always agree to surrender theirs in return, three answers may be made:

First, as was pointed out by Secretary Knox, and as was held by this Court in *Charlton* v. *Kelly*, there is no requirement that extradition treaties should be reciprocal. Secretary Knox in that case said—and his language was quoted with approval by this Court in its opinion (229 U. S. at p. 476):

> "Therefore, *since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens*, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

Second, even Great Britain (a nation which has always been zealous in the protection of her citizens' rights against foreign powers) has entered into extradition treaties which by their terms *bind her unequivocally and in all cases to sur-*

*render British subjects without reciprocity**—a far more drastic doctrine than any which we now urge.

Third, the question whether the surrender of American citizens is proper, so long as civil-law countries continue unwilling to surrender their citizens in return, is in any event a question for the Executive, and not for the Courts, and it cannot possibly arise in this case. We urge, not that the United States *must* extradite its own citizens in every case, but simply that it *may* do so. It the Executive should feel unwilling to extradite these respondents (after a magistrate has passed on the evidence of their guilt) because France may be unwilling to extradite Frenchmen to us, the Executive may decline to make the surrender. All we urge is that the hands of the Executive and of the courts should not be tied in advance, and that the Secretary should retain that discretionary power which the treaty gives him, and which we believe its framers intended.

IV. The claim of "Practical Construction" of the Treaty in favor of respondents is unfounded.

The District Court in *Ex parte McCabe, supra,* and the majority of the Circuit Court of Appeals in the case at bar (R. 32-34), placed great reliance upon the fact that in four instances (set forth in the opinion in *Ex parte McCabe,* 46 Fed. at 378-9), the State Department is claimed to have construed the language of our former treaty with Mexico as prohibiting the extradition of citizens of either country.

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* Halsbury's Laws of England (1910 Ed.) Vol. 14, p. 406, note (s), cites the treaties with Luxemburg, Spain and Switzerland as falling within this class. Article I of the Treaty with Luxemburg of 1880 (Hertslet's Commercial Treaties, Vol. XV, p. 234) provides that Great Britain agrees to deliver up "all persons" charged with specified crimes, while Luxemburg agrees to deliver up "all persons, excepting subjects of the Grand Duchy". Article I of the Treaty with Switzerland (Hertslet, Vol. XV, p. 384) and Article I of the Treaty with Spain (Hertslet, Vol. XIV, p. 519) contain similar language.

Even if it be assumed that the rulings claimed to have been made by the State Department some forty years ago in the case of the Mexican treaty would be applied by the State Department at the present day to the French treaty now before this Court, the fact remains that the construction of a treaty is in the last analysis for the judiciary, and that "practical construction" by the Executive, while entitled to respectful consideration, is in no sense conclusive. This is well illustrated by the decision of this Court in *United States* v. *Rauscher,* 119 U. S. 407, 415-16. In that case the question was whether a fugitive criminal extradited to the United States for one offense could be tried on his arrival for a different one. The State Department (see 119 U. S., at p. 415) had construed the treaty there involved as authorizing trial of the accused for a different offense from that for which he had been extradited. Arguments in support of this construction were advanced at the bar by the Solicitor General. The British Foreign Office, on the other hand, had adopted the opposite view. This Court rejected the construction of the State Department and adopted that of Great Britain.

Furthermore, upon careful analysis it will be found that the instances relied upon in *Ex parte McCabe* and in the Circuit Court of Appeals wholly fail to establish the claim of "practical construction", even in the case of the Mexican treaty.

The former Mexican treaty, under which *Ex parte McCabe* was decided, was signed in 1861. (12 Stat. 1199, Malloy's Treaties, Vol. 1, p. 1127). Article 6 contained language with respect to the extradition of citizens identical with that of Article V of the present French treaty.

The first case involving the application of this provision in the Mexican treaty appears to have arisen in 1871, when the United States requested the Mexican Government to extradite certain Mexican citizens who had escaped to the State of Sonora, after committing murder and robbery in Arizona.

The fact that the United States requested such extradition furnishes an indication that at that date at least our Government entertained no idea that the treaty prevented such extradition. The Mexican Government of the day, however, appears to have entertained different views, and declined extradition. The case is reported in *Foreign Relations, 1871,* pages 628-30, and in *Moore on Extradition,* Vol. 1, page 164.

The problem was again presented in 1874, when one Francisco Perez, a Mexican, murdered an American citizen in Texas and escaped into Mexico. This is the first of the four cases cited in *Ex parte McCabe,* and in the opinion of the Circuit Court of Appeals below, as sustaining the present claim of respondents. The Circuit Court of Appeals says, in dealing with the *Perez* case:

> "Secretary Fish refused to request the Mexican authorities to surrender him, and although his reasons are apparently not now accessible, the ruling itself was inconsistent with the belief that the clause reserved to both parties a discretionary power of surrender. If it did, it certainly was his duty to ask for the exercise of that discretion." (R. 33.)

This language of the Circuit Court of Appeals is not borne out by the facts. What actually happened in the *Perez* case was thus stated by Secretary Frelinghuysen, in a report to the Senate contained in Senate Executive Document 98, 48th Congress, First Session, ser. 2166, reprinted in Wharton's Digest of International Law (2nd ed., 1887) vol. 2, section 268, at page 752:

> "In 1874 Francisco Perez, a Mexican, murdered Joseph Alexander, an American, residing at Brownsville, Tex., and escaped into Mexico. It was the purpose of this Government to have Perez sent back for trial on this side the frontier, and the instruction from Mr. Fish to Mr. Foster states that though this, under the treaty, could not be expected as a matter of right, and would not be asked as a matter of favor or even accepted as such with any understanding that it would be reciprocated

by us, still Mr. Foster was authorized to apply to the Mexican Government, making known all the circumstances, and submitting whether they were not such as to warrant a voluntary surrender of the party, if this could in any case be done. October 3, 1874, Mr. Foster reported that the Mexican Government declined to surrender Perez, and Mr. Fish, in acknowledging this dispatch, remarked that it was not surprising that the Mexican Government so acted, especially as it had a technical right to refuse the request."

It will be noted from the above that far from refusing to request extradition, Secretary Fish actually directed that such a request should be made, coupling it, however, with the express explanation that the surrender, if granted, would be a voluntary or discretionary act of the Mexican Government.

The next reported case arising under this section was in 1877, when two Mexicans, Dominguez and Barrera, fled to Mexico after committing a murder in Texas. The United States duly requested their extradition; and they were arrested by the Mexican authorities and held for surrender. They thereupon applied to the Mexican courts for an "amparo", the equivalent of our writ of *habeas corpus*. The court of first instance sustained their claim and directed their discharge, upon the ground that as Mexican ctizens they were exempt from extradition. On appeal, however, the Supreme Court of Mexico, by a vote of nine to five, reversed the court of first instance and held that they were subject to extradition. While the decision appears to have been based in part at least upon the fact that the Mexican citizenship of the accused was not conclusively established, the opinion of Chief Justice Vallarta contains strong *dicta* to the effect that the language of the treaty does not forbid extradition of citizens, but makes such extradition discretionary with the Executive—a view which he had himself put into operation as foreign secretary of Mexico the year before. This case is reported in *Moore on Extradition*, vol. 1, pages 165-6, and

in *Foreign Relations, 1878,* pages 560-567, including (at p. 562) a complete translation of the opinion of Chief Justice Vallarta. (Another translation of portions of the same opinion appears in the dissenting opinion of Judge Manton in the case at bar (R. 44)).

Again in 1878, the Mexican Government, on request of the United States, while expressly reciting that its act was done as a matter of discretion, ordered the surrender of certain Mexicans who had participated in an assault on the jail in Rio Grande City, Texas. Before the execution of the order, the Governor of Texas made its issuance the basis of a demand for the surrender of other Mexicans *as a matter of right*; and the Mexican Government thereupon withdrew the order. *Moore on Extradition,* vol. 1, pages 164-5. *Foreign Relations, 1878,* pages 539-40. The action of the Mexican Government in this case was entirely consistent with the position that the extradition of citizens could be granted as a matter of discretion, but not as a matter of right.

In 1884 arose the case of Alexander Trimble, an American citizen whose extradition was demanded by Mexico. This is the second of the four cases relied upon in *Ex parte McCabe,* and in the Circuit Court of Appeals below, to sustain the claim of "practical construction" according to the respondents' views. Again, an examination of the facts discloses that no such construction was in fact made.

The case is covered in detail in a report made by Secretary Frelinghuysen to the Senate on February 13, 1884 (Senate Executive Document 98, 48th Congress, first session, ser. 2166, quoted in full in *Wharton's Digest of International Law,* (2nd ed., 1887) vol. 2, section 268, pages 749-754.) In dealing with this case the Circuit Court of Appeals said (R. 33):

> "Secretary Frelinghuysen refused to deliver him up upon demand by Mexico, following the precedent of 1874."

In fact the Secretary did nothing of the sort. What happened was this: On receiving by telegraph a request for Trimble's extradition, Secretary Frelinghuysen replied that under the language of the treaty an American citizen could not be surrendered. Subsequently, and after giving further consideration to the matter, the Secretary decided that his first conclusion might have been wrong, and that the matter was doubtful and should be tested in the courts. He accordingly sent a second telegram to the United States Marshal in Texas directing that Trimble be held in custody pending further consideration; but in the meanwhile Trimble had already been released, and apparently was never recaptured.

In response to a Senate resolution, Secretary Frelinghuysen submitted a lengthy report on the entire affair. After a discussion of various authorities, his report concludes as follows (*Wharton's Digest of International Law,* (2nd ed., 1887) vol. 2, section 268, page 753):

> "* * * I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.
>
> 'Such being the construction of the treaty, and believing that the time to prevent a violation of the law of extradition was before the citizens left the jurisdiction of the United States, I telegraphed the governor of Texas that an American citizen could not legally be held under the treaty for extradition.
>
> 'It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power.
>
> *'On further reflection,* in view of the fact that fourteen of our treaties with other nations contain provisions identical with that contained in our treaty with Mexico, and impressed also with the fact that the safety and peace of society on the frontier would be greatly injured if criminals, because citizens of this country, could here find an asylum and go unpunished, *I concluded that the question was one of too much importance to be settled by the dictum of any individual, but should receive judicial*

determination, and to this end I telegraphed the officers to hold the accused until they received other direction. The accused had, however, after my first telegram, been discharged.

'*I now propose to inform the officers in Texas*, who, subject to the supervision of the President, are authorized to determine whether a surrender of the accused should be made, *that if another arrest is made and a case of guilt is made out the President will not, on the ground of citizenship, interfere with an order of surrender if such be made, but requires that the accused be informed that if he or they wish a hearing before the Supreme Court of the United States on habeas corpus as to the power of the President in the matter of extradition, or as to the true construction of the treaty before the surrender be actually made, every facility for such hearing will be afforded.* Should the court hold that the President has discretionary power of extraditing citizens proven guilty of crime, the evil apprehended will not be realized, and should the court hold that the President has the power to extradite only when bound by treaty to do so, Congress can then, if it should be its pleasure, by statute confer the discretionary power."

From this it will be seen that while Secretary Frelinghuysen appears to have been personally of the opinion that the treaty forbade the extradition of citizens, he nevertheless entertained grave doubts as to the correctness of his own views, and was unwillin, to let the matter rest on his decision, but expressly directed that the matter be brought before the courts. It also appears that he was fully alive to the unfortunate results which would follow if it should be held that no power existed to make the extradition; and he apparently hoped that the courts would declare that the power existed. This is certainly very far from constituting a definite administrative construction in any sense.

In 1888 Secretary Bayard, apparently misapprehending the views of his predecessor, or forgetting his predecessor's desire to have the question tested in the courts, refused to

surrender an American citizen, one Hudson, on a charge of robbery. No reasons were given for the decision other than the mere citation of the *Trimble* case, contained in a letter to the Governor of Texas, quoted in *Ex parte McCabe,* at page 378. The same ruling was again made in 1891, shortly before the decision of the *McCabe* case, and again was supported merely by a citation of the *Trimble* case. See letter of Secretary Blaine quoted in *Ex parte McCabe,* at page 379.

Summary of the above.

It will thus be seen that down to the time of the decision in *Ex parte McCabe* nothing remotely approaching a uniform course of "practical construction", favorable to the respondents, had been adopted by either the Government of Mexico or the Government of the United States under the Mexican treaty. On the contrary, we find the Government of the United States, in at least four instances, requesting the surrender by Mexico of Mexican citizens—an act which is consistent only with the theory that such surrender was a matter of discretion under the treaty. We find the Mexican Executive in at least two cases recognizing that the surrender of its own citizens could properly be made under the Treaty as a matter of discretion; and we find the Supreme Court of Mexico sustaining this interpretation. As regards the converse case of the surrender of American citizens, the only considered opinion was that of Secretary Frelinghuysen, in *Trimble's* case, in which the Secretary stated in substance that, while he *thought* he had no power to surrender American citizens, the question was doubtful, and was one upon which an independent judicial decision should be had.

In this state of affairs came the decision in *Ex parte McCabe*; and the embarrassment resulting from this decision, and from the conflicting views of the parties, appears to have been such that in 1899, when a new extradition treaty was negotiated with Mexico, the disputed article was changed to

read as follows (Art. IV of Mexican Treaty of 1899, 31 Stat. 1818, Malloy's Treaties, Vol. 1, p. 1184):

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, *but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so.*" (Art. IV.)

Substantially similar language is found in six other extradition treaties.*

Upon this alteration of the Mexican Treaty the majority of the Circuit Court of Appeals in the present case bases a further argument, which in effect is this: At the time the Franco-American Treaty was negotiated in 1909, the parties had before them the precedent of the Mexican amendment of 1899, which contained an express grant of discretion; and their failure to incorporate the same express grant in the Franco-American Treaty compels the conclusion that they intended deliberately to exclude discretion.

We submit, however, that the insertion of express words stating that the parties *may* surrender their own citizens although they are not *bound* to do so adds nothing to the force of the Treaty, and that these words have been inserted on occasion simply from an abundance of caution on the part of the draftsman.† The Anglo-Belgian Treaty which was before the Court in *In re Galwey, supra,* contained no such provision. Its language on its face stated unequivocally and without qualification that neither party *"shall be bound"* to

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*Japan, 1886; Argentina, 1896; Orange Free State, 1896; Guatemala, 1903; Nicaragua, 1905; Uruguay, 1905 (See *infra*, Appendix A, p. 41).

†As stated in the dissenting opinion in the present case, the reason for the amendment of the Mexican Treaty in 1899

> "was merely to clear up doubts cast upon the plain meaning of the provisions of Article VI of the 1861 Convention, by an erroneous executive construction accepted without question by an inferior federal tribunal in the McCabe case. The amended provision attempts to clarify, but not to amplify, the short statement of Article VI of the 1861 convention. It adds nothing, because where the country *is not bound* but *may* surrender, discretion is necessarily implied." (R. 45).

extradite its own citizens. Yet the Queen's Bench Division had no difficulty in holding that these words implied the existence of a discretionary power. Mr. Justice Field in *R.* v. *Wilson, supra,* was of the same opinion.

When the parties met to negotiate the Franco-American Treaty of 1909, they had before them, as already noted, a prior treaty under which the United States was unequivocally bound to surrender its citizens to France. No cases had arisen, similar to those arising with respect to Mexico, of American citizens committing crimes in France and returning to remain unpunished in the United States. There is nothing to indicate that either the rulings of the State Department some twenty years earlier on the Mexican Treaty, or the decision of Judge Maxey in *Ex parte McCabe,* were present in the mind of either party at the time the French Treaty was negotiated.

The Attitude of the State Department at the Present Time.

At pp. 23-29 *supra* we have discussed the instances relied upon by the respondents, and by the Court below, as establishing a "practical construction" favorable to their views. All of these instances occurred with respect to the former Mexican Treaty prior to the decision in *Ex parte McCabe* in 1891. After 1891, it appears to have been the attitude of the State Department that the decision in *Ex parte McCabe* constituted a binding judicial interpretation, which the Department was compelled to follow; and there seems to have been no further reported decision by the State Department upon the issue. At the present date, in view of the conflict of judicial authority, the attitude of the Department appears to be one of neutrality; and it is apparently the Department's position that the question is an open one upon which an authoritative judgment of the courts should be had. This at least would seem to be indicated by the following letter setting forth the views of the State Department with respect to the case at bar, written prior to the argument in the Circuit Court of Appeals:

Address Official Communications to
THE SECRETARY OF STATE
WASHINGTON, D. C.

No. 1079417
from
Department of Justice
In reply refer to
Le 211.51 Neidecker, B. Coles/28

DEPARTMENT OF STATE
WASHINGTON

December 11, 1935

My dear Mr. Attorney General:

I have received your letter dated December 10, 1935, (File: JBK 95-100-124) and its enclosure concerning the case pending in the United States Circuit Court of Appeals for the Second Circuit arising out of the requisition of the French Government for the extradition to France of B. Coles Neidecker, George W. Neidecker and Aubrey Neidecker.

In the event the Circuit Court of Appeals requests the United States District Attorney for the Southern District of New York for an expression of this Department's views regarding the case, I should be glad if you would direct him to state to the Court (1) that this Department recognizes that the interpretation of treaties pertains to the judicial as well as to the executive branches of the Government; and (2) that in view of the apparent conflict between the decision of the United States District Court for the Southern District of New York in the Neidecker case and the decision of the United States District Court in Texas, ex parte McCabe, 46 Fed. 363, this Department would find it helpful to have a decision by an appellate court on the question of the interpretation of Article V of the Treaty of Extradition concluded on January 16, 1909, between the United States and France.

Sincerely yours,

For the Secretary of State,
R. Walton Moore
Assistant Secretary

The Honorable
Homer S. Cummings
Attorney General

Le: FMD:RUL:SS
12/11

V. The Franco-American Treaty, and other treaties containing similar language, have regularly been interpreted by textwriters as conferring a discretion on the Executive.

Textwriters on international law have classified extradition treaties under three heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state (such as our present Treaty with Great Britain, and the Treaty with Italy which was before this Court in *Charlton* v. *Kelly*, 229 U. S. 447),

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered" (such as the Anglo-Swiss Treaty which was before the Court in *R.* v. *Wilson, supra*);

3. Those which give to the asylum state a discretion to surrender its own citizens or not, as the Executive may decide in each case.

The Franco-American Extradition Treaty now before the Court, and other treaties containing similar language, are regularly classified by modern authorities under the third of these categories, along with treaties which, like the Mexican treaty above quoted, contain express words of discretion. *Oppenheim on International Law* (4th Ed. 1928), Vol. I, page 569:

> "Although Great Britain is ready to extradite one of her own subjects for crimes committe abroad, she is, in some cases prevented from doing so because the extradition treaties concerned comprise a clause stipulating that nationals 'should not' be extradited. Thus the extradition of Alfred Thomas Wilson, who had committed theft in Zurich in 1877, and whose surrender was claimed by Switzerland, had to be refused, because the Anglo-Swiss Treaty of 1874 comprised such a clause (see *Reg.* v. *Wilson* (1877) 3 Q.B.D. 42). To avoid such a deplorable result subsequent extradition treaties be-

tween Great Britain and foreign states usually comprise a clause according to which no party is compelled to extradite nationals. It is thus left to the discretion of the parties whether they will extradite one of their own subjects or not. As late as 1906 the extradition of a British subject had to be refused to France because Article 2 of the Anglo-French Treaty of 1896 precluded the surrender of nationals. However, by a Convention of 1908 (Treaty Series (1909) No. 34) Article 2 of the Treaty of 1896 has been remodelled."

Saint Aubin—L'Extradition et le Droit Extraditionnel (1913) Vol. 1, p. 309, dealing with the amendment to the Treaty just mentioned by Oppenheim, *supra*, says:

"Following this new provision of the law concerning the situation of nationals with respect to extradition between France and England, we may cite the Article of the Franco-American Treaty of January 6, 1909, which deals with the same point. It will be noted that although the idea is identical the expressions in this Article are different:

'Neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention.'

It is again the asylum state which has the sovereign discretion to decide whether or not the demand should be granted when it concerns one of its own subjects. We thus reach the practical application of the resolution of the Congress of Oxford and Brussels, which had regarded it as equally dangerous to exclude systematically from the treaties the extradition of citizens and to decide that they should always be extradited."

Travers—Droit Pénal International (1922) Vol. V, pages 28-31, 32:

"Considered from the point of view of the extradition of nationals, the treaties adopted by France are divided into four different types:

1. Some adopt purely and simply the principle that the character of a national of the state excludes any possibility of extradition;

2. Others stipulate that this character renders extradition entirely discretionary;

* * * * * * * * *

*The second group of treaties signed by France includes those which have been signed with * * *; the United States of January 6, 1909, Article V:*

'Neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.' "

VI. A comparison of the discretionary language of Article V of the Franco-American Treaty with other provisions intended to exclude discretion supports our argument.

We may further distinguish the discretionary language that a party "shall not be bound" to surrender its own citizens with the language regularly used in other phases of extradition treaties when it is intended that a particular subject should be completely excluded from the operation of the treaty and no opportunity left for discretion.

In nearly all extradition treaties there is found in the same document the discretionary provision that neither party *"shall be bound"* to extradite its own citizens and also the mandatory provision that extradition *"shall not be granted"* in specified cases, such as those involving political offenses, offenses barred by the Statute of Limitations, offenses committed prior to the Treaty, etc. Thus in the Franco-American Treaty of 1909, now before the Court, we find:

Art. V—Neither party *"shall be bound"* to extradite its own citizens.

Art. VI—Fugitive criminals *"shall not be surrendered"* for political offenses.

Art. VIII—Extradition *"shall not be granted"* where prosecution is barred by the Statute of Limitations of the asylum state.

The contrast between the mandatory and discretionary language of the two types is clearly apparent.

In some cases, in fact, the contrast is pointed out in a single article. Thus Article III of the Treaty with Peru of 1870 (18 Stat. 719, Malloy's Treaties, Vol. 2, p. 1428) provides in a single paragraph:

> "The provisions of the present treaty *shall not be applied* in any manner to any crime or offense of a purely political character, nor shall the provisions of the present treaty *be applied* in any manner to the crimes enumerated in the second article committed anterior to the date of the exchange of the ratification hereof. Neither of the contracting parties *shall be bound* to deliver up its own citizens under the stipulations of this treaty."

In nearly every extradition treaty ever concluded by the United States, the same contrast is present. Thus in Article III of the Treaty with Brazil of 1897 (33 Stat. 2091; Malloy's Treaties, Vol. 1, p. 148) it is provided:

> "Extradition *shall not be granted* if the offense on which the surrender is demanded be of a political character."

Article V of the same Treaty provides:

> "The contracting parties *shall in no case be obliged* to surrender their own citizens in virtue of the stipulations of the present treaty."

And Article VIII of the same Treaty provides that extradition *"shall be refused"* where prosecution is barred by the Statute of Limitations of the asylum state.

In Appendix A (*infra*, p. 40) we have examined and tabulated the text of every extradition treaty made by the

United States from 1789 to date. This examination serves to confirm in a striking way the distinctions above outlined. It serves also to point out the appalling results which would follow from a holding that American citizens cannot be extradited under treaties having language similar to that of the Franco-American Treaty of 1909. Such treaties are now in force, containing this identical language, with a large majority of countries of the civilized globe. If the respondents' contention be correct, in every one of those countries an American citizen can commit any crime, no matter how heinous, and if he once succeeds in taking refuge in the United States, no power on earth can punish him for his offense.

VII. There is no distinction between the case at bar and the decision of the Queen's Bench Division in *In re Galwey*.

Upon its face the decision of the Queen's Bench Division in *In re Galwey* is clearly an authority for our contentions. The majority of the Circuit Court of Appeals, however, refused to follow it upon the ground that the circumstances under which that decision was rendered were different from those here involved. We quote from the majority opinion as follows (R. 34).

> "A ruling of an English court (in Re Galway, (1896) 1 Q.B. 230), merely goes to show how completely the clause should be interpreted by its history. Before 1887 the extradition treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. R. v. Wilson, 3 Q.B. 42. In that year it was amended and what we have called the Prussian clause [i.e.—a clause similar to that contained in the Franco-American Treaty] was substituted. Obviously the amendment meant to make a change; it would make none at all, if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that is, an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant

for us can therefore be inferred, because In Re Galway held that a discretionary power had been conferred."

Obviously the amendment to the Anglo-Belgian Treaty in the *Galwey* case had to be given some meaning. It is equally obvious that the language of the new Franco-American Treaty here must be given some meaning, and that the parties intended to make *some* change from the earlier language of the 1843 treaty. But there is no authority whatever for assuming that the change which the parties intended was that which the Circuit Court of Appeals has held—i.e. a change from an absolute obligation to surrender citizens in every case to an absolute prohibition against surrendering them at all.

If that had been the intention of the parties, they could easily have expressed it by incorporating in the 1909 treaty a clause such as that which had been presented in *R.* v. *Wilson, supra,* to the effect that:

"No citizen of either party *shall be surrendered.*"

Or they could have followed the precedent of Art. XXIV of the treaty between the United States and the Two Sicilies of 1855* (the only American treaty of the kind), which provided that:

"The citizens and subjects of each of the high contracting parties *shall remain exempt* from the stipulations of the preceding articles."

Or they could have copied, in Article V of the Franco-American treaty, the mandatory wording used in Articles VI and VIII of the very same treaty, which clearly exclude all discretion with respect to extradition for political offenses and those barred by the statute of limitations (*supra,* pp. 35-6).

But the parties did nothing of the kind. Instead they adopted language which, on its face, certainly shows no in-

* 11 Stat. 639, 653; Malloy's Treaties, Vol. 2, p. 1814, 1822.

tention to confer an absolute exemption. Not only is there no authority for saying that any such intention existed; but on the contrary, as pointed out above (*supra*, pp. 18-21), it is far more reasonable to assume that the new language represented a compromise between the views of the two parties, and that the change was from an absolute and unqualified obligation to surrender citizens in all cases to a qualified or discretionary obligation to do so or not, as the Executive might deem fit.

CONCLUSION.

We submit that there is no sound authority for declaring, as a matter of law, that the Executive has no power in any case to surrender an American citizen under treaties containing such language as that herein involved. On the contrary, such treaties should be interpreted, as they have been by the French Government, by textwriters, by the dissenting opinion below, and by the English courts, as rendering extradition discretionary with the political department of the Government, subject always to the prior requirement of a hearing before the magistrate, and the production of evidence sufficient to convince him that there is probable cause for believing the accused guilty. It will then be the duty of the State Department to decide whether or not in its discretion surrender should take place; and there is no warrant for declaring in advance that this discretion does not exist.

It is accordingly respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed and the respondents remanded for the purpose of extradition hearings according to law.

September 10, 1936.

DAVIS POLK WARDWELL GARDINER & REED,
Attorneys for Petitioners.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel.

APPENDIX A.

In this Appendix are tabulated the various provisions of all extradition treaties ever made by the United States (inducing both those now in force and those which have been superseded or terminated) in which language is used, whether discretionary or mandatory, to exclude particular persons or subjects. This tabulation supports the distinction made at pages 35-37 of this brief between the discretionary language habitually used to deal with the extradition of citizens, and the mandatory language used when it is desired to exclude all discretion.

1. Provisions dealing with extradition of citizens of the asylum state.

Extradition treaties on this subject may be classified under four heads:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state.

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"—leaving no opportunity for discretion.

3. Those which in express terms give to the asylum state a discretion to surrender its own citizens.

4. Those which, like the present Franco-American Treaty, provide simply that "neither party *shall be bound*" to surrender its own citizens—language which was interpreted by the English courts in *In re Gaiwey* and *R.* v. *Wilson* as meaning that the Executive, while not bound to surrender its own citizens, had discretion to do so.

The American treaties on the subject may be classified under these four heads as follows:

1. Those which contain an absolute and unqualified obligation to surrender all persons, including citizens of the asylum state.

Dominican Republic, 1867, (M 1, 403)*
Ecuador, 1872, (M 1, 436)
France, 1843, (M 1, 526)
Great Britain, 1794, Art. XXVII (M 1, 605)
" " 1842, Art. X (M 1, 655)
" " 1889, (M 1, 740)
" " 1931, (47 Stat. 2122)
Hawaiian Islands, 1849, Art. XIV (M 1, 913)
Italy, 1868, (M 1, 966)
Nicaragua, 1870, (M 2, 1287)
Orange Free State, 1871, (M 2, 1310)
Switzerland, 1850, (M 2, 1767-8)
Venezuela, 1860, (M 2, 1855)

2. Those which contain an express provision that citizens of the asylum state "shall not be surrendered"—leaving no opportunity for discretion.

Only one instance of such a treaty has been found, this being Article XXIV of the Treaty of 1855 with the King of the Two Sicilies (M 2, 1822) which reads:

> "The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals."

3. Those which in express terms give to the asylum state a discretion to surrender its own citizens.

Seven such treaties have been found, as follows:

Argentina, 1896, Art. III (M 1, 26) reading as follows:

> "In no case shall the nationality of the person accused be an impediment to his extradition, under the conditions stipulated by the present treaty, but neither Gov-

* References to M 1, M 2 or M 3 are to Volumes 1, 2 and 3 of Malloy's Edition of the Treaties of the United States.

ernment shall be bound to deliver its own citizens for extradition under this Convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

Orange Free State, 1896, Art. V (M 2, 1316) is identical with the foregoing.

Guatemala, 1903, Art. V (M 1, 881) reading as follows:

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

Mexico, 1899, Art. IV (M 1, 1186) and Nicaragua, 1905, Art. V (M 2, 1295) are identical with the foregoing.

Japan, 1886, Art. VII (M 1, 1027) reading as follows:

"Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up, if in their discretion it be deemed proper to do so."

Uruguay, 1905, Art. X (M 2, 1828) reading as follows:

"The obligation to grant extradition shall not in any case extend to the citizens of the two parties, but the executive authority of each shall have power to deliver them up if, in its discretion, it is deemed proper to do so."

4. Those which, like the present Franco-American Treaty, provide simply that "neither party shall be bound" to surrender its own citizens—language which was interpreted by the English courts in In re Galwey and R. v. Wilson as meaning that the Executive, while not bound to surrender its own citizens, had discretion to do so.

This is much the largest class of treaties, there being forty-eight of this kind all told, of which some thirty-two are in

force today. The commonest phrasing is identical with that of the Franco-American Treaty and provides that neither party *"shall be bound"* to extradite its own citizens. This language appears in the following treaties:

Albania, 1933, Art. VIII (Treaty Series, No. 902)
Austria, 1930, Art. VIII (46 Stat. 2784)
Austria-Hungary, 1856, Art. II (M 1, 37)
Baden, 1857, Art. II (M 1, 52)
Bavaria, 1853, Art. III (M 1, 59)
Belgium, 1874, Art. IV (M 1, 89)
" 1882, Art. V (M 1, 102)
" 1901, Art. V (M 1, 108)
Bolivia, 1900, Art. V (M 1, 127)
Bulgaria, 1924, Art. VIII (43 Stat. 1889)
Chile, 1900, Art. V (M 1, 194)
Colombia, 1888, Art. X (M 1, 325)
Costa Rica, 1922, Art. VIII (M 3, 2551)
Cuba, 1904, Art. V (M 1, 369)
Denmark, 1902, Art. V (M 1, 393)
Dominican Republic, 1909, Art. VIII (M 3, 2570)
Esthonia, 1923, Art. VIII (43 Stat. 1852)
Finland, 1924, Art. VIII (44 Stat. 2004)
France, 1909, Art. V (M 3, 2582)
Germany, 1930, Art. II (47 Stat. 1863)
Greece, 1931, Art. VIII (47 Stat. 2191)
Hanover, 1855, Art. III (M 1, 897)
Honduras, 1909, Art. VIII (M 3, 1688)
Iraq, 1934, Art. VIII (Treaty Series, No. 907)
Latvia, 1923, Art. VIII (43 Stat. 1741)
Lithuania, 1924, Art. VIII (43 Stat. 1838)
Luxemburg, 1883, Art. V (M 1, 1055)
Mexico, 1861, Art. VI (M 1, 1127)
Netherlands, 1880, Art. VIII (M 2, 1263)
" 1887, Art. VIII (M 2, 1269)
Norway, 1893, Art. V (M 2, 1303)
Ottoman Empire, 1874, Art. VII (M 2, 1343)
Panama, 1904, Art. V (M 2, 1359)
Paraguay, 1913, Art. VIII (M 3, 2786)
Peru, 1870, Art. III (M 2, 1428)
" 1899, Art. V (M 2, 1447)
Poland, 1927, Art. VIII (46 Stat. 2287)
Portugal, 1908, Art. VIII (M 2, 1472)
Prussia, 1852, Art. III (M 2, 1503)
Rumania, 1924, Art. VIII (44 Stat. 2025)

Salvador, 1911, Art. VIII (M 3, 2823)
Servia, 1901, Art. V (M 2, 1624)
Siam, 1922, Art. VIII (43 Stat. 1752)
Spain, 1877, Art. VIII (M 2, 1667)
Spain, 1904, Art. VIII (M 2, 1715)
Sweden, 1893, Art. V (M 2, 1738)
Sweden and Norway, 1860, Art. IV (M 2, 1757)
Venezuela, 1922, Art. VIII (M 3, 2873)

In five of the foregoing treaties (all concluded with Germanic states in the 1850's) there is a reference in the preamble to the effect that the contracting party other than the United States is not permitted by its own laws to extradite its own citizens. Thus in the preamble of the Treaty with Austria-Hungary of 1856, *supra*, occurs the language:

> "Whereas the laws of Austria forbid the surrender of its own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any *obligation* to surrender citizens of the United States * * *."

Substantially similar language appears in the preambles of the following treaties among those listed *supra*:

Baden, 1857
Bavaria, 1853
Hanover, 1855
Prussia, 1852

In a few treaties there are minor variants of the language to the effect that neither party "shall be bound" to surrender its own citizens. In each case, however, the meaning of the language is the same. These variants are as follows:

(a) "The contracting parties *shall in no case be obliged* to surrender their own citizens."
Brazil, 1897, Art. V (M 1, 149)

(b) "The contracting parties *shall not be required* to deliver up their own citizens."
Russia, 1887, Art. IV (M 2, 1529)

(c) "In no case and for no motive shall the High Contracting Parties *be obliged to deliver up* their own subjects."
Salvador, 1870, Art. V (M 2, 1549)

It is to be noted that the language of the Treaty with Salvador, just quoted, while more emphatic than that of the others, is still no more emphatic than the language of the Anglo-Belgian Treaty before the Court in *In re Galwey*, where the phrase was nevertheless held to imply the existence of discretion.

2. Provisions dealing with political offenses.

Provisions excluding political offenses from the purview of extradition treaties are quite common. In every instance, in marked contrast to the language dealing with the extradition of citizens, the phraseology employed is mandatory and emphatic. Several varying forms of language, all to the same effect, are employed:

(a) "Extradition *will not be granted*" for political offenses.
Argentina, 1896, Art. VI (M 1, 27)
Brazil, 1897, Art. III (M 1, 148)
Switzerland, 1900, Art. VII (M 2, 1773)

The Argentine Treaty, *supra*, further provides on this subject of political offenses:

"In cases of doubt with relation to the present article, the decision of the judicial authorities of the country to which the demand for extradition is directed will be final."

The Swiss Treaty, *supra*, provides:

"If the question arises in a particular case, whether the offense committed is or is not of a political character, the Authorities of the State upon which the demand is made shall decide."

(b) The provisions of the Treaty *"shall not apply"* or *"shall not be applied"* or *"shall not be applicable"* to political offenses.

Belgium, 1874, Art. III (M 1, 89)
" 1882, Art. IV (M 1, 102)
" 1901, Art. IV (M 1, 108)
Dominican Republic, 1867, Art. XXX (M 1, 413)
France, 1843, Art. V (M 1, 527)
Guatemala, 1903, Art. IV (M 1, 881)
Hayti, 1864 Art. XLI (M 1, 932)
Italy, 1868, Art. III (M 1, 967)
Mexico, 1861, Art. VI (M 1, 1127)
Netherlands, 1880, Art. III (M 2, 1263)
" 1887, Art. III (M 2, 1268)
Nicaragua, 1870, Art. III (M 2, 1288)
" 1905, Art. IV (M 2, 1295)
Orange Free State, 1871, Art. XII (M 2, 1313)
Ottoman Empire, 1874, Art. III (M 2, 1342)
Peru, 1870, Art. III (M 2, 1428)
Salvador, 1870, Art. III (M 2, 1549)
Sweden and Norway, 1860, Art. V (M 2, 1757)
Switzerland, 1850, Art. XVII (M 2, 1768)
Two Sicilies, 1855, Art. XXIV (M 2, 1822)
Venezuela, 1860, Art. XXX (M 2, 1855)

(c) *"Surrender shall not take place"* if it appear that extradition is sought for a political offense.

Japan 1886, Art IV (M 1, 1027)
Russia, 1887, Art. III (M. 2, 1528)

(d) *"Extradition shall not take place"* for political offenses.

Mexico, 1899, Art. III (M 1, 1186)

(e) Fugitive criminals *"shall not be surrendered"* for political offenses.

Bolivia, 1900 Art. VI (M 1, 127)
Chile, 1900, Art. VI (M 1, 194)
Cuba, 1904, Art. VI (M 1, 369)
Denmark, 1902, Art. VI (M 1, 393)
France, 1909, Art. VI (M 3, 2583)
Great Britain, 1889, Art. II (M 1, 741)
" " 1931, Art. VI (47 Stat. 2124)
Norway, 1893, Art. VI (M 2, 1303)

Orange Free State, 1896, Art. VI (M 2, 1316)
Panama, 1904, Art. VI (M 2, 1359)
Peru, 1899, Art. VI (M 2, 1447)
Servia, 1901, Art. VI (M 2, 1625)
Sweden, 1893, Art. VI (M 2, 1738)

In all of the foregoing group of treaties except that of 1931 with Great Britain, it is provided that:

"If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government on which the demand for surrender is made" shall be final.

(f) "The provisions of this Convention (or Treaty) shall not import a claim of extradition for any crime or offense of a political character."

Albania, 1933, Art. III (Treaty Series, No. 902)
Austria, 1930, Art. III (46 Stat. 2783)
Bulgaria, 1924, Art. III (43 Stat. 1888)
Costa Rica, 1922, Art. III (M 3, 2551)
Dominican Republic, 1909, Art. III (M 2, 2569)
Esthonia, 1923, Art. III (43 Stat. 1851)
Finland, 1924, Art. III (44 Stat. 2003)
Germany, 1930, Art. IV (47 Stat. 1867)
Greece, 1931, Art. III (47 Stat. 2189)
Honduras, 1909, Art. III (M 3, 2687)
Iraq, 1934, Art. III (Treaty Series, No. 907)
Latvia, 1923, Art. III (43 Stat. 1740)
Lithuania, 1924, Art. III (43 Stat. 1837)
Paraguay, 1913 Art. III (M 3, 2785)
Poland, 1927, Art. III (46 Stat. 2286)
Portugal, 1908, Art. III (M. 2, 1472)
Rumania, 1924, Art. III (44 Stat. 2024)
Salvador, 1911, Art. III (M 3, 2822)
Siam, 1922, Art. III (43 Stat. 1751)
Spain, 1877, Art. III (M 2, 1666)
" 1904, Art. III (M 2, 1714)
Venezuela, 1922, Art. III (M 3, 2872)

(g) "Political crimes and misdemeanors are expressly excepted from the present treaty."

Uruguay, 1905, Art. III (M 2, 1826)

3. Provisions excluding extradition where the offense is barred by the Statute of Limitations.

It is frequently provided in extradition treaties that surrender shall not be had where the offense is barred by the Statute of Limitations—reference usually being made to the Statute of Limitations of the asylum states although in a few cases reference is made to the Statute of Limitations of the demanding state as well. The language is mandatory in all cases save one. A number of forms are used:

(a) Extradition *"will not be granted"* or *"shall not be granted"* where the offense is barred by the Statute of Limitations.

Argentina, 1896, Art. VII (M 1, 27)
Belgium, 1882, Art. IX (M 1, 103)
" 1901, Art. IX (M 1, 109)
Bolivia, 1900, Art. VII (M 1, 128)
Chile, 1900, Art. VII (M 1, 194)
Cuba, 1904, Art. VII (M 1, 369)
Denmark, 1902, Art. VII (M 1, 393)
France, 1909, Art. VIII (M 3, 2583)
Guatemala, 1903, Art. VIII (M 1, 881)
Honduras, 1909, Art. V (M 3, 2687)
Luxemburg, 1883, Art. IX (M 1, 1056)
Nicaragua, 1905, Art. VIII (M 2, 1296)
Norway, 1893, Art. VII (M 2, 1303)
Orange Free State, 1896, Art. VII (M 2, 1316)
Panama, 1904, Art. VII (M 2, 1359)
Peru, 1899, Art. VII (M 2, 1448)
Servia, 1901, Art. VII (M 2, 1624)
Sweden, 1893, Art. VII (M 2, 1738)
Switzerland, 1900, Art. VIII (M 2, 1773)

(b) Fugitives *"shall not be surrendered"* where the offense is barred by the Statute of Limitations.

Albania, 1933, Art. V (Treaty Series, No. 902)
Austria, 1930, Art. V (46 Stat. 2784)
Bulgaria, 1924, Art. V (43 Stat. 1888)
Costa Rica, 1922, Art. V (M 3, 2551)
Dominican Republic, 1909, Art. V (M 3, 2569)
Esthonia, 1923, Art. V (43 Stat. 1851)

Finland, 1924, Art. V (44 Stat. 2004)
Germany, 1930, Art. VI (47 Stat. 1867)
Greece, 1931, Art. V (47 Stat. 2190)
Iraq, 1934, Art. V (Treaty Series, No. 907)
Latvia, 1923, Art. V (43 Stat. 1740)
Lithuania, 1924, Art. V (43 Stat. 1837)
Netherlands, 1880, Art. V (M 2, 1263)
Netherlands, 1887 Art. V (M 2, 1268)
Paraguay, 1913, Art. V (M 3, 2785)
Poland, 1927, Art. V (46 Stat. 2286)
Portugal, 1908, Art. V (M 2, 1472)
Rumania, 1924, Art. V (44 Stat. 2024)
Salvador, 1911, Art. V (M 3, 2823)
Siam, 1922, Art. V (43 Stat. 1751)
Spain, 1877, Art. V (M 2, 1667)
Venezuela, 1922, Art. V (M 3, 2873)

(c) Extradition *"shall be refused"* where the offense is barred by the Statute of Limitations.
Brazil, 1897, Art. VIII (M 1, 149)

(d) Extradition *"shall not take place"* where the offense is barred by the Statute of Limitations.
Mexico, 1899, Art. III (M 1, 1186)
Great Britain, 1931, Art. V (47 Stat. 2124)

(e) The only exception to the rule that statute-barred offenders are exempted by mandatory language is Uruguay, 1905, Art. VII, which provides that "extradition *may be refused*" in such cases. (M 2, 1828).

4. Provisions excluding extradition for offenses committed prior to the treaty.

Here again in all of the treaties where such a provision occurs the language is mandatory:

(a) The provisions of this Treaty *"shall not apply"* or *"shall not be applied"* in respect of offenses committed prior to the Treaty.
Belgium, 1874, Art. III (M 1, 89)
Dominican Republic, 1867, Art. XXX (M 1, 413)
France, 1843, Art. V (M 1, 527)
Great Britain, 1889, Art. VIII (M 1, 742)

Hayti, 1864, Art. XLI (M 1, 932)
Mexico, 1861 Art. VI (M 1, 1127)
Orange Free State, 1871, Art. XII (M 2, 1313)
Peru, 1870, Art. III (M 2, 1428)
Switzerland, 1850, Art. XVII (M 2, 1768)
Two Sicilies, 1855, Art. XXIV (M 2, 1822)
Venezuela, 1860, Art. XXX (M 2, 1855)

(b) *"Surrender shall not be demanded"* for offenses committed prior to the Treaty.
Russia, 1887, Art. III (M 2, 1528)

(c) *"No person shall be subject to extradition"* for offenses committed prior to the Treaty.
Spain, 1877, Art. IV (M 2, 1667)

5. Provisions dealing with the death penalty.

A few countries, whose own laws forbid the imposition of the death penalty, have exacted a provision that extradition shall not be granted to the United States where the offense is punishable in the United States with death.

Thus the Treaty of 1908 with Portugal (M 2, 1469) in its text contains no mention of exception for the death penalty. Portugal however, insisted upon provision being made for this; and accordingly the United States Senate in ratifying the Treaty stated that:

> "* * * it is agreed by the United States that no person charged with crime *shall be extraditable from Portugal* upon whom the death penalty can be inflicted for the offense charged by the laws of the jurisdiction in which the charge is pending."

The same procedure was followed in respect of the Treaty of 1922 with Costa Rica (43 Stat. 1629).

In Article IV of the Treaty of 1922 with Venezuela (M 3, 2872) it is provided:

> "In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to

decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted."

OCT 12 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

Nos. 6, 7 and 8.

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES De FERRY De FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel for Petitioners.

IN THE

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October Term, 1936.
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REPLY BRIEF FOR PETITIONERS.

In this reply brief we shall deal with two points raised in the brief of respondents:—first, the claim that the construc-

tion for which we contend would render the Treaty unconstitutional; and second, the claim that the English decisions cited in our main brief are inapplicable because the English constitutional system is different from ours.

The claim that the construction for which we contend would render the treaty unconstitutional.

At pages 39-44 of the respondents' brief, it is argued, upon the authority of *Schechter* v. *United States,* 295 U. S. 495, that a construction of the Franco-American Treaty as giving to the Executive any discretion over the extradition of American citizens would render the Treaty unconstitutional. Respondents, in fact, go to the length of saying (page 43 of their brief), that even an express grant of Executive discretion in so many words in a Treaty (such as is contained in the present Treaties with Guatemala, Mexico, Nicaragua and Uruguay) would be ineffective and void.

In the same connection it is argued that the English decisions cited in our main brief cannot be applicable, since in England, unlike the United States, there is nothing to prevent Parliament from delegating its powers to the Executive.

It is difficult to take either of these arguments seriously. The delegation of discretion within reasonable limits to the Executive is of course unobjectionable.

> *Mahler* v. *Eby,* 264 U. S. 32;
> *Union Bridge Co.* v. *United States,* 204 U. S. 364;
> *Hampton & Co.* v. *United States,* 276 U. S. 394.

The discretion for which we contend is obviously not an arbitrary or unreasonable discretion. We make no such claim as is asserted at page 42 of respondents' brief, that the Executive has "an absolute discretion, unguided by any standard, to deport or to refuse to deport, an American citizen." No matter what the citizenship of the accused, the Executive

cannot raise a finger to deport him until three things have been established:

1. There must first be a treaty, duly ratified by the Senate and made a part of the law of the land, specifying certain definite offenses as extraditable.

2. It must be shown that the offense with which the accused is charged is one of those falling within the list enumerated by the treaty.

3. Finally, there must be a full hearing before a judicial officer at which the accused may be heard in his defense, and the judicial officer must be satisfied that there is probable cause for believing him guilty of the offense charged.

Not until all three of these conditions have been satisfied can the Executive surrender *any* person, whether foreign or American. All that we contend is that, after all these three conditions have been satisfied and a judicial hearing held, the Executive can then in its discretion, and without breach of treaty obligations, determine whether it will surrender an American citizen or not; whereas in the case of anyone other than an American citizen, the Executive is required, under penalty of breach of faith, to make the surrender in any event.

It is hard to see how an American citizen can complain that he is being discriminated against by being put on a more favored basis than an alien, by being given an opportunity to appeal to the discretion of the State Department, after a magistrate has found against him.

It is equally hard to see how anyone can complain that he is being deprived of due process by being given the chance of Executive discretion *in his favor* after a judicial officer has certified that he is probably guilty of an extraditable crime. The discretion, such as it is, is obviously all in favor of the accused. If an alien is held for extradition to France, and the magistrate has found probable cause for believing

him guilty, the Executive must either surrender him or face the consequences of a breach of the Treaty. The only difference in the case of an American citizen is that the Executive may, without violating the Treaty, decide to set him at liberty. If it sets him free, he is obviously not in a position to complain. The discretion, such as it is, is no more hostile to the accused than is the existence of the power to pardon or parole convicted criminals. It could scarcely be contended that the existence of the Federal Parole Board, with a discretionary power to release prisoners before they have served their full sentence, renders the entire system of criminal law arbitrary and unconstitutional; yet that, in substance, is the position for which respondents contend.

In *Cusack Co.* v. *City of Chicago,* 242 U. S. 526, a city ordinance prohibiting the erection of billboards in residence districts in the interest of safety, morality, etc., was claimed to be unduly discriminatory and arbitrary, as such erection of billboards was nevertheless permitted in certain districts if the consent in writing was obtained of the owners of a majority of the frontage on both sides of the streets in which such billboard was to be erected. To this contention the court answered (p. 530):

> "The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler* v. *Judges of Registration,* 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531."

Further, respondents' argument, if it proves anything, proves too much. At page 13 of our main brief, we have already noted that under the Statute the last word in *every* extradition case, after the courts have acted, is with the State Department. The Statute (U. S. Code, Title 18, Sec. 653) does not require the Secretary of State to surrender a fugi-

tive in any case, but provides merely that after the magistrate has certified his determination against the accused, *"it shall be lawful"* for the Secretary to make the surrender; and this has been construed as giving the Secretary a discretionary right to refuse to make the surender in any case. (See authorities cited at page 13 of our main brief).

Even if the language of the Statute were to be regarded as imperative, it would not give rise to any obligation enforceable in the courts. Even in the case of an alien who has been duly committed after hearing to await extradition, the Secretary can always refuse to surrender him and set him free, regardless of the magistrate's findings. It is true that in the case of an alien, where the Treaty obligation to surrender is absolute and unqualified, such an act might properly be regarded by the foreign Government concerned as a breach of the Treaty; but it would not be a breach of which the courts could take cognizance. The courts could not mandamus the Executive to compel the surrender of the accused to a foreign country, any more than they can mandamus a Governor to surrender a fugitive to another State of the Union (*Kentucky* v. *Dennison,* 24 How. 66), or any more than they can mandamus the Executive to hang a convicted murderer who has refused to accept a commutation of his sentence (*Biddle* v. *Perovich,* 274 U. S. 480, 487).

The claim that the English decisions cited in our main brief are inapplicable because the English constitutional system is different from ours.

At pages 45-53 of respondents' brief the argument is made that English decisions cannot be accepted as a guide because of a difference in the English Constitutional system, and because of an alleged difference in the English extradition laws.

This contention is obviously unsound. Extradition proceedings in England under the Extradition Act of 1870* are substantially identical with extradition proceedings here under Revised Statutes 5270 (U. S. Code, Title 18, Section 651): In both cases a Treaty must exist before the Statute is called into operation. In England there must not only be a Treaty, but an Order in Council specifically reciting the Treaty and declaring the Extradition Act applicable thereto.

Respondents, in seeking to distinguish *In Re Galwey* [1896], 1 Q. B. 230, says at pages 48-49 of their brief:

> "The English Extradition Act of 1870, in Section 6 thereof, provides that where that Act is made to apply by treaty in the case of any foreign state, every fugitive criminal of that state, who is in or suspected of being in that part of Her Majesty's Dominions covered by the treaty, shall be liable to be apprehended and surrendered in the manner provided by the Act. *It is at once apparent that this Act creates a power in the Executive to surrender for extradition any person, whether a British subject or not.* It confers upon the Executive authority the broadest possible power, without constitutional limitation, except that some Treaty must exist making the statute applicable to the foreign state demanding the fugitive."

---

* Section 2 of the English Extradition Act of 1870 provides that the Act may be made to apply by Order in Council to any foreign state with which an extradition treaty has been made, subject to certain restrictions (not here material) laid down in Sections 3 and 4.

Section 6 of the Act provides:

> "Where this Act applies in the case of any foreign State, every fugitive criminal of that state who is in or suspected of being in any part of her Majesty's Dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act."

Subsequent provisions set forth almost exactly the same machinery (preliminary warrant by a magistrate, hearings before the magistrate on probable cause, certification of the magistrate's findings and evidence to the Foreign Office, commitment by the magistrate, and surrender by the Foreign Office after such hearing and certification) as are provided by U. S. Code, Title 18, Sections 651 and 653.

This language, however, overlooks the specific holding of the English Courts in *The Queen* v. *Wilson,* 3 Q. B. D. 42, (cited at pp. 9-10 of our main brief). In that case the Extradition Act of 1870 existed, and there was a Treaty under which the Act was called into operation. But the Treaty in that case, unlike the Treaty which was before the Court *In Re Galwey,* and unlike the Franco-American Treaty here presented, left no room for discretion, and expressly provided "that no subject of the United Kingdom *shall be delivered up.*"

The Court accordingly held that under the combined effect of this Treaty and the Extradition Act of 1870 there was *no power in the Executive* to surrender British subjects. Consequently the argument that the Extradition Act of 1870 creates any broad power in the British Executive, independent of Treaty, falls to the ground. While it is true that in England a treaty does not of itself become a part of the law of the land, the fact remains that in England, as here, the statutory machinery for extradition is only brought into operation when there is an applicable treaty to set it going. And in England, as here, it is the language of the Treaty which is decisive upon the question whether a particular individual is extraditable or not.

CONCLUSION.

It is accordingly respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed and the Respondents remanded for the purpose of extradition hearings according to law.

October 10, 1936.

DAVIS POLK WARDWELL GARDINER & REED
Attorneys for Respondents-Appellees.

FRANK L. POLK,
PORTER R. CHANDLER,
Of Counsel.

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IN THE

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BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

FREDERIC R. COUDERT,
FREDERIC R. COUDERT, JR.,
Of Counsel for Respondents.

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SUPREME COURT OF THE UNITED STATES

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BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinions Below.

The opinion of the District Court appears at R. 20; those of the Circuit Court of Appeals at R. 58-68. Neither has been reported.

The Facts and the Issue.

The facts are simple; the issue narrow. Both are completely dealt with in the admirable opinion of the Court below (R. 51). The Extradition Treaty of 1909 with France provides that:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

Respondents, native born American citizens, having been taken into custody by the New York Police Department upon a preliminary warrant of a United States Commissioner, issued upon application of the Acting Consulate General of France, sued out these writs of habeas corpus.

The sole question presented is whether respondents are subject to operation of the Treaty.

ARGUMENT.

The Circuit Court of Appeals properly held that respondents were exempt from extradition under the Treaty.

The Treaty clause which this Court is now asked to construe first appeared in the extradition treaty with Prussia in 1852. Between 1852 and 1874 the same clause appeared in eight additional treaties.

In 1874 Secretary of State Fish refused the request of Mexico for extradition of an American citizen upon the ground that an identical treaty clause absolutely exempted nationals. In 1884, 1888 and in 1891, the Mexican Treaty was similarly construed by Secretaries Frelinghuysen, Bayard and Blaine.

Secretary Frelinghuysen said:

> "'I understand the treaty with Mexico as reading thus:
>
> 'The President shall be bound to surrender any person guilty of crime *unless such person is a citizen of the United States*'."

Secretary Blaine declared that the clause had been "held to preclude the surrender of a citizen of the United States."

The foregoing Executive decisions were predicated upon the principle that the President is without power to banish American citizens under the Constitution and that such power can only arise under authority conferred by treaty; that the treaty in question, having expressly excepted citizens from its obligation, does not confer such power.

In 1891 the United States District Court in Texas was called upon to construe the Mexican Treaty upon petition for a writ of habeas corpus. *Ex Parte McCabe,* 46 Fed. 363. In a well considered opinion the Court sustained the position taken by the State Department upon the four occasions above referred to. This is the leading case upon the subject. Its authority has been, and is, uniformly recognized by the State Department, text writers, and at least implicitly by the United States Supreme Court in *Charlton* v. *Kelly,* 229 U. S. 447.

> Moore on Extradition, Vol. I, §135,
> Harvard Research in International Law, Part I, Extradition, p. 124, Note 10 (1935).

That the State Department presently recognizes the authority of the *McCabe* decision was conceded by counsel for petitioners upon the argument in the District Court (R. 27).

Between 1891, the date of the *McCabe* decision, and 1909, the date of the present French Treaty, there were negotiated twenty extradition treaties of which fourteen adopted the clause used in the present Treaty. The remaining six employed the formula used in the Japanese Treaty of 1886 which was in the following language:

> "Neither government shall be bound to deliver its own citizens for extradition under this convention; *but either shall have the power to deliver them up if in its discretion it be deemed proper to do so.*"

It will be noted that this clause constitutes a radical innovation in that it expressly purports to confer that discretionary power the existence of which had been denied by the State Department and the District Court in construing treaties not containing such express grant of power.

While the present clause has been repeatedly used right up to the present time, the Japanese formula was last used in the Nicaraguan Treaty of 1905. The present clause now appears in all but an insignificant number of our current extradition treaties.

This Court, in *Charlton* v. *Kelly*, supra, undertook an analysis of the extradition treaties in force at 1910. While the decision itself is not in point, the analysis is very much so. The Court classified our extradition treaties in two categories:

> "The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of 'persons' without limitation or qualification are the following:
>
> With Great Britain, August 9, 1842, * * *;
> With France, November 9th, 1843, * * *;
> With Italy, February 8, 1868, * * *;
> With Venezuela, August 27, 1860, * * *;
> With Ecuador, June 28, 1872, * * *;
> With Dominican Republic, February 8, 1867, * * *."

It is quite clear, therefore, that this Court considered that all other extradition treaties, including those containing the clause in question, fell within the category of "those which expressly exempt citizens."

No exception to the extradition of citizens was contained in the original treaty with France of 1843. Having failed for a period of sixty-six years to obtain the extradition of a single Frenchman under that treaty, the United States in 1909 brought about the modification thereof by the addi-

tion of the present formula, become classic, as the result of more than sixty years of use and interpretation by administrative, legislative and judicial authorities.

Surely the treaty making power must have intended to employ such formula with its theretofore acquired significance! In the words of the prevailing opinion below (R. 56),

> "We are dealing with a clause chosen by the President and Senate out of a diplomatic locker and encrusted with its proper traditions which in such matters count for much."

This clause cannot be adequately construed without regard to its historic background. So considered, the intent of the treaty making power is plain. It is not for the courts to rewrite treaties, especially those of long standing. Had the President and Senate been dissatisfied with the results following the construction adopted by the State Department and the judiciary, it would have been a simple matter to employ different language in making this treaty.

At the time of the negotiation of the present treaty the State Department had before it three recognized treaty formulae for dealing with this question:

1. That applicable to all persons regardless of citizenship;
2. That purporting to confer discretion upon the Executive in the case of citizens, as in the Japanese Treaty; and
3. The formula found in the treaty at bar.

The selection of the third evidenced a clear intent to absolutely exempt American citizens from operation of the treaty.

Moreover, the construction contended for by petitioners raises a grave constitutional question. To permit the President unfettered discretion in the matter of deportation of citizens, is to confer upon him an arbitrary power

violative of the Fifth Amendment. It would authorize an arbitrary "discrimination in favor of one as against another of the same class" (*Giozza* v. *Tiernan*, 148 U. S. 657, 662), the class in this instance, consisting of American nationals who would be subject to operation of the Treaty save for their nationality.

Petitioners' Points.

Petitioners urge that as there is no applicable decision by this Court, the writ should be granted. It is difficult to see what purpose would be served by review unless this Court should feel that the Circuit Court of Appeals has erred in following the precedents of sixy years. If correct, the decision below places an adequate seal of authority upon the traditional interpretation, particularly, if buttressed by refusal to grant certiorari. To reverse, would be in substance to rewrite the bulk of our extradition treaties now in force.

As Petitioners point out (p. 5, Petition), there are now in force thirty-two other extradition treaties containing the present clause. To rewrite this vast body of treaty law is scarcely a judicial function. Yet this is precisely what Petitioners would have this Court do, not at the behest of the State Department, but at the request of a foreign government which has uniformly refused to permit extradition of its own citizens.

Petitioners, likewise, suggested that there is a conflict of authorities. This is not the case. The American authorities, executive and judicial, have been uniform throughout this long period. Petitioners rely solely upon an English decision which they contend takes a contrary view. *In re Galway* (1896) 1 Q. B. 230. An analysis of this decision leads ineluctably to the conclusion that by a parity of reasoning it is wholly in favor of relators' position. In the language of Hand, J. in the Court below, Petitioners' contention was effectively disposed of thus (R. 54):

"A ruling of an English court merely goes to show how completely the clause should be interpreted by its history. Before 1887 the Extradition Treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. (*Regina* v. *Wilson*, 3 Q. B. 42.) In that year it was amended and what we have called the Prussian clause was substituted. Obviously, the amendment meant to make a change. It would make none at all if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that is an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred because *In re Galway* held that 'a discretionary power had been conferred'."

The original French Treaty of 1843, having failed of its purpose to bring about the extradition of all nationals, was amended to bring it into conformity with the facts and practise of one of the parties by completely exempting nationals of both parties and so restoring that reciprocity which is the foundation of treaty relations.

CONCLUSION.

The petition for writs of certiorari should be denied.

Respectfully submitted,

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Respondent.

THE SAME

Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

FREDERIC R. COUDERT,
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IN THE

Supreme Court of the United States

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relators, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic,
Petitioners,

against

UNITED STATES on the Relation of B. COLES NEIDECKER,
Respondent.

THE SAME,
Petitioners,

against

UNITED STATES on the Relation of GEORGE W. NEIDECKER,
Respondent.

THE SAME,
Petitioners,

against

UNITED STATES on the Relation of AUBREY NEIDECKER,
Respondent.

October Term, 1936.
Nos. 6, 7 and 8.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Statement.

We do not object to the petitioners' statement of the nature of the case and of the question presented, although the latter is somewhat more broadly stated than is necessary.

We do maintain, with the majority of the Circuit Court of Appeals of the Second Circuit in this case, that no

authority or power is created in either the judiciary or the Executive to extradite American citizens to France for any crime whatever under the Extradition Treaty of 1909 between the United States and France, because of Article V thereof, which provides:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

We shall not attempt to answer the seven points of the petitioners' argument *seriatim,* because we believe that a re-grouping of the points of the argument will be more conducive to an orderly and proper presentation thereof.

BRIEF OF THE ARGUMENT.

Our argument, therefore, will be made, as it was below, under the following three points:—

POINT I.

American authority is practically unanimous in construing the terms of the French Extradition Treaty of 1909 as exempting American citizens from its operation.

At the end of this point we will answer petitioners' Points II, IV, and V.

POINT II.

It was the intent of the parties in concluding the French Extradition Treaty of 1909 to positively exempt citizens from its operation.

Under this point we shall reply to petitioners' Points III and VI.

POINT III.

A construction of the French Extradition Treaty of 1909 as vesting discretion in the executive to extradite American citizens, would be unconstitutional.

Under this point we distinguish the English authorities upon which the petitioners so largely rely. Consequently, under this point we shall answer petitioners' Points "I" and "VII" which are supported by the British authorities.

Summary of the Argument.

The basis of the decision below herein is that the relators are native born citizens of the United States and that as such they are exempt from the operation of the Extradition Treaty under color of which they were held.

The Treaty, Article I, provides in general terms for the extradition of persons "charged with certain crimes" as follows:

> "The Government of the United States and the Government of France mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offences specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other; Provided That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offence had been there committed."

The foregoing Article is, however, subject to the express limitation of Article V, to wit:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

Petitioners contend that the foregoing provisions of the Treaty have the effect of conferring upon the Executive the discretionary right and power to deliver up citizens as and when it may elect.

We, on the contrary, and the majority of the Circuit Court of Appeals of the Second Circuit, take the position that the effect of Article V is to wholly deprive the Executive of the right and power to deliver up any American citizen.

The question is not one of first impression. The very words of Article V first appear in an American extradition treaty in 1852—that with Prussia—and have since found their way into nearly every one of our extradition treaties. As is stated in the preamble of the Prussian Treaty, the reason for the incorporation of this clause is the attainment of "strict reciprocity" with those States which refuse the extradition of their own nationals.

The precise significance of the provision of the present Article V was first established by the Secretary of State in 1877 upon an application for extradition, pursuant to the Mexican Treaty of 1861, framed in language identical with that here in question. Upon that occasion and in three cases arising subsequently, successive Secretaries of State held that, by virtue of this provision, the Executive was without right or power to extradite citizens, and refused to act.

In 1891 the United States District Court in Texas, in *Ex Parte McCabe*, 46 F. 363, upon application for a writ of habeas corpus, sustained the position of the Secretaries of State and ordered the discharge of the prisoner. This was the leading case upon the subject. Its authority has been uniformly recognized to the present day by the State Department, by text writers, and, at least implicitly, by this Court in *Charlton* v. *Kelly*, 229 U. S. 447.

Prior to 1909, one of the very few American treaties which did not contain a provision similar to that of the present Article V, was that with France of 1843. The old

Treaty was supplanted by the new Treaty of 1909, now before the Court. The new Treaty differed from the old one primarily in the addition of Article V. The language of the additional Article, having appeared in treaties for some sixty years, and having been the subject of a uniform and unbroken current of construction over a period of 42 years, had in 1909 acquired an almost classic significance. It meant that as the American Executive had no power to deliver up its citizens upon the demand of the other party to such Treaty, such citizens were to be exempt. The reason for its incorporation at this time in the French Treaty is not far to seek. The municipal law of France did not permit the extradition of its citizens. Addition of the new clause, therefore, merely reestablished the strict reciprocity which has always been the foundation of American extradition treaties. It is inconceivable that in concluding the Treaty of 1909, the treaty-making power should have intended to clothe this language with a significance other than that acquired through the long evolutionary process hereinbefore outlined. It is therefore submitted that in negotiating the Treaty of 1909 with France it was the intent of the parties that citizens of the respective States should be exempt from the operation of the Treaty.

Thus, our first point is that by long continued and uniform construction, judicial and executive, the necessary effect of Article V is to positively exempt American citizens from the operation of the Treaty.

Our second point is in a sense corollary to the first. The language of Article V having acquired a precise and recognized significance at the time the Treaty was concluded, it must have been the intent and purpose of the parties to employ it in its accepted sense, to wit, that it constituted a positive exemption.

Our third point goes to the question of constitutional limitation. Even if the question were *res integra*, it would be necessary to decide it as have the State Department, the District Court in the *McCabe* case, and the majority of the

Circuit Court of Appeals in this case. To decide otherwise would bring the Treaty in conflict with the constitutional inhibition against both improper delegation of legislative authority and deprivation of due process.

The Opinions Below.

The opinion of the majority of the Circuit Court of Appeals in this case as written by Judge Hand, is in itself an admirable exposition of our position. As, however, the opinion relied upon other points, it was not deemed necessary to consider the constitutional question discussed in Point III of this Brief.

We respectfully submit that the logic of the conclusion arrived at in the dissenting opinion below, upon which the petitioners so largely rely, will not withstand careful scrutiny.

That opinion first considers briefly the history of the international policy of refusal to extradite nationals, and arrives at the not illogical conclusion that the extradition of all, nationals included, is "a desideratum of the most enlightened publicists". Yet, Judge Manton's quotation from the opinion of Professor Puente establishes that, however much we may deplore the inability to obtain uniform and universal extradition of criminals internationally, the fact is that the prevailing opinion in Latin America and elsewhere today is against the surrender of nationals for trial in the tribunals of a foreign state. It is this very fact and our own insistence upon reciprocity, which has led the United States to enter into the treaties, such as that here involved with France, which exempt American nationals.

Judge Manton himself, in an article, entitled "Extradition of Nationals," which he wrote for the *Temple Law Quarterly* shortly prior to the argument of these cases before the Circuit Court of Appeals, expressly concedes

> "* * * that the present practice of nations is overwhelmingly against the extradition of their own nationals" (p. 12),

and, speaking of reciprocity as a principle in the extradition of nationals, says:

> "This is the principle upon which all international relations should rest, and it should certainly be so with the extradition of nationals" (10 Temple Law Quarterly 12, at 19).

The dissenting opinion relies upon the following quotation from the decision of this Court in *Charlton* vs. *Kelly, supra*, but, in drawing conclusions, completely ignores the significance of the italicized clauses.

> "The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons', *where no such exception is made in the treaty itself.* Upon the contrary, the word 'persons' includes all persons *when not qualified as it is in some of the treaties between this and other nations.*"
> (81 Fed. (2) 32 at 36, italics ours.)

As is so clearly pointed out in the majority opinion herein, this Court in the *Charlton* case classified our extradition treaties into two classes, those which require the surrender of nationals, and those in which the Prussian clause (which is the same clause as that here involved) "exempts" them. Consequently, the very quotation from the opinion of this Court upon which the dissenting opinion relies, contains in itself the qualification which destroys completely the entire effect of Judge Manton's argument.

Judge Manton's principal criticism of the decision in the case of *Ex parte McCabe,* 46 Fed. 663, is that its conclusions are based upon a "dogmatic declaration without any exposition of reasons in its support". (81 Fed. (2) 32 at 37.)

We respectfully submit that the opinion in the *McCabe* case, far from being dogmatic and without any exposition of reasons in its support, is an excellent and careful analysis of the whole law upon the subject and we respectfully refer to that opinion in support of our argument in this case.

In disposing of our constitutional argument, the dissenting opinion below first relies upon the opinion of the Mexican Judge Vallarta, which is referred to in the *McCabe* case, as authority for the conclusion that a discretion in the American Executive to arbitrarily choose between two American citizens for purposes of extradition, is neither arbitrary nor capricious.

The dissenting opinion finally disposes of our constitutional argument by a reference to the decision of the District Court in *Ex parte Charlton*, 185 Fed. 880, which was affirmed by this Court under the name of *Charlton* v. *Kelly*, *supra*. The quotation which Judge Manton cites from the decision of Judge Rellstab in that case not only fails to dispose of our constitutional argument but, on the contrary, supports it. Judge Rellstab, in effect, says that the constitutional argument is to be determined solely by the answer to the question "whether there is an existing treaty between the United States and Italy which *requires* that *Charlton* shall be surrendered to the demanding government." He then proceeds to the conclusion that the treaty between the United States and Italy was in existence and that it *required* the extradition of all American citizens. By exactly the same logic Judge Rellstab must have come to the conclusion in our situation that because the French Treaty does not *require* the surrender of American citizens, the surrender of an American citizen by the Executive thereunder would constitute the deprivation of due process of law.

As between the majority and minority opinions of the Circuit Court of Appeals in this case, we respectfully submit that authority and logic support that of the majority.

POINT I.

American authority is practically unanimous in construing the terms of the French Extradition Treaty of 1909 as exempting American citizens from its operation.

The question first came before the executive and judicial authorities in connection with the Extradition Treaty of 1861 with Mexico. Article VI of the Mexican Treaty was couched in the very words of Article V of the present French Treaty.

Upon four separate occasions between 1877 and 1891, four Secretaries of State refused to extradite citizens upon demand of the Mexican Government on the ground that under the terms of the Treaty the President lacked the right and power to do so.

In 1891, the position taken by the Secretaries of State was sustained by the United States District Court for Texas (*Ex Parte McCabe*, 43 F. 363). Many years later the *McCabe* decision was by clear implication approved by this Court in *Charlton* v. *Kelly*, 229 U. S. 447, and it has now been expressly approved and followed by the majority of the Circuit Court of Appeals in this case. We know nothing of the recent decision by Geiger, J., referred to at page 11 of the petitioners' brief. Certainly, in the absence of an opinion, it is entitled to but little consideration in the face of the authority now arrayed against it.

The decision in the *McCabe* case was so well considered and expressed that it furnishes not only an invaluable precedent but an admirable exposition of our position. We are therefore constrained to quote at some length from the opinion of Judge Maxey.

Article VI of the Mexican Treaty was as follows:

> "Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this Treaty."

Judge Maxey first considered at length the question as to whether or not in the absence of a treaty the Executive had the right to surrender any fugitive from the justice of a foreign nation, and concluded, upon the basis of *Holmes* v. *Jennison*, 14 Peters 574, *United States* v. *Rauscher*, 119 U. S. 407, and other authorities, that the following quotation from *Spear, Extradition*, stated the American law upon the subject:

> "The preponderance of authority derived from practice, the legislation of congress, the opinions of the attorney generals of the United States, and the deliverances of the judiciary, both state and federal, clearly show that no department of the general government is either bound or authorized to deliver up fugitive criminals from other countries, except in those cases for which provision is made by treaty. The powers of the government are bestowed by the constitution; and, except as it may be clothed with the extradition power through treaties, no such power is found among the express or implied grants to congress, or among those to the executive department, or among the powers given to the federal judiciary. *There can be no discretion in the exercise of the power, since it does not exist at all*" (p. 372, italics ours).

Judge Maxey then continued, at page 374:

> "What, then, was the purpose and intention of the two governments in inserting the stipulation: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty?' We have seen that, with substantial unanimity, American jurists and statesmen recognized, under the law of nations, no obligation to surrender a fugitive, whether citizen or alien, and that by our government it was never done except in few, if more than one, isolated instances. Hence the resulting necessity to enter into treaty engagements for that purpose. Hence the extradition statute of 1848 and amendments, embodied in Rev. St. § 5270 *et seq.*, which, in conjunction with treaties, the supreme court

affirms in Rauscher's Case, supra, 'are in their nature exclusive.' If there were no pre-existing obligation to extradite a fugitive, the obligation must necessarily grow out of either statute law or treaty engagement. It is therefore apparent that the purpose of the treaty was to authorize the parties to do something which they had no previous authority to do. The parties come together, through their respective representatives, and make an agreement—an obligatory, binding agreement—to surrender, under certain circumstances, persons who commit crimes and flee from offended justice. They are authorized to act as they bind themselves. The agreement is mutual, the rights and obligations reciprocal. If power to surrender be not affirmatively given, the right to demand a fugitive can have no existence. The right to demand implies, *ex vi termini*, the corresponding authority and obligation to surrender. But both to exist should be founded upon express stipulations. The agreement here is, in article 1 of the treaty, that the contracting parties shall, on requisition made in their name, deliver up persons, who, being accused of crimes, etc. 'Persons', without qualification, would necessarily include all persons, citizens and aliens alike; and, under that general designation, the executive, it is believed, could not lawfully withhold the surrender of an American citizen upon requisition made by the republic of Mexico. But the treaty does not stop there. A subsequent limiting clause denies the obligation to surrender a citizen: 'Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.' The obligation to deliver being denied, upon what can rest the authority? It did not exist in our government, as already shown, independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance either in the constitution or laws of congress. The former is silent as to extradition, considered from an international standpoint, and simply confers the general power to make treaties; from which springs the right of the treaty-making power to negotiate with foreign governments for the extradi-

tion of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; *that is, there should be a binding treaty stipulation to authorize the executive to surrender a fugitive.* The first act of congress on the subject was approved August 12, 1848. Its caption reads: 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders.' *9 St. at Large, 302. Section 5270, Rev. St., which is, in substance, the same as the first section of the act of 1848, provides that, if the officer upon the preliminary hearing deems the evidence sufficient to sustain the charge, 'he shall certify the same * * * to the secretary of state, that a warrant may issue upon the requisition of the proper authorities for the surrender of such person, according to the stipulations of the treaty or convention.' The warrant for surrender does not issue according to the will or discretion of the executive, but agreeably to the stipulation of the treaty; that is to say, according as the parties have obligated themselves by treaty engagements.* If it were otherwise, if the executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station. *The statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied.*" (Italics ours.)

It is to be noted, in connection with the foregoing passage, that the extradition statute referred to remains unchanged (18 U. S. C. A. §651).

After analyzing all the existent American extradition treaties, Judge Maxey continued:

> "As indicating the construction given by Mr. Lawrence, a writer of distinction, to the clause of the treaty in question, he makes the following classification of our extradition treaties:
> '(1) those excepting the subjects of the other contracting power. (2) Those containing no such exception.' Under the first are embraced treaties with Mexico, Prussia, and others. The second includes those with Great Britain, Switzerland, etc. Whart. Confl. Laws, § 857 notes. To same effect see 7 Amer. & Eng. Enc. Law, pp. 616, 617, par 11. 'Some of the extradiction treaties of the United States,' says Mr. Spear, 'expressly provide that neither party shall be required to deliver up its own citizens, which is equivalent to saying that neither will, in respect to such citizens, furnish any facility to the other for bringing them to justice for any offense which they may commit against its laws; and hence, if, under such a treaty, either party should by mistake deliver up one of its citizens it clearly would not be allowable for the other to put that citizen on trial upon the pretext that the terms of the treaty relate only to the extradition, and have no relation whatever to the trial, either as to the person or the offense to be tried.' Spear, Extradition, 79.
>
> "All of our law-writers, without an exception, brought to the attention of the court, concur in the opinion that the sixth article of the treaty with Mexico forbids the United States from surrendering their own citizens. Nor is there less uniformity in the practical construction given that article by the department of state. And such construction by a department of the government charged with the administration of a law, although not binding upon the courts, should properly receive great weight when the law is sought to be judicially construed" (pp. 377, 8).

Judge Maxey then summarized the State Department precedents:

> "To the consideration, then, of the practice of the state department in construing the last clause of the

sixth article of the treaty the attention of the court will be next briefly directed.

"(1) In 1874, says Mr. Frelinghuysen, in discussing the Trimble case, a Mexican, Francisco Perez, charged with the murder of Joseph Alexander, an American, at Brownsville, Tex., escaped into Mexico, and Mr. Fish, secretary of state, declined to prefer a formal requisition to the Mexican Government for the surrender of the fugitive.

"(2) The Mexican authorities in 1884 made demand on our government for the extradition of Alexander Trimble, a citizen of the United States, who was accused of crimes committed in the Republic of Mexico. The secretary of state, Mr. Frelinghuysen, construing the treaty as inhibiting the surrender of an American citizen, refused to deliver up Trimble. In a carefully prepared opinion in that case he states his conclusion in the following words: 'I understand the treaty with Mexico as reading thus: "The president shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States."' Senate Ex. Doc. No. 98, 1st Sess. 48th Cong.

"(3) Charles Hudson, an American citizen, was held in Texas, in 1888, for extradition to Mexico on a charge of robbery committed in that republic. In response to a letter from the governor of Texas, Mr. Bayard, secretary of state, replies:

> "'I have the honor to acknowledge the receipt of your letter of the 18th instant in relation to the case of Charles Hudson, held in Texas for extradition to Mexico on a charge of robbery. It being alleged that Hudson is a citizen of the United States, you request to be informed whether the department will adhere to its former ruling in the Trimble case, since that ruling, if applied to the case in question, might prevent the extradition of the prisoner, and render futile the efforts and expenditures of the Mexican government to obtain his surrender. As the decision of the department in the Trimble case is understood, it was held that as, under the extradition treaty between the United States and Mexico,

"neither of the contracting parties shall be bound to deliver up its own citizens," the president would not be authorized, in the absence of an express grant of power under the laws of the United States, to surrender to Mexico a citizen of the United States. The treaty provision referred to, which is found similarly stated in many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the treaty in the Trimble case is correct.' (See letter on file in department of state, Austin, Tex.)

"(4) More recently, and within the past 60 days, the question was considered by Mr. Blaine, present secretary of state, whose letter to W. H. Crain is published in the public prints. Dr. Martinez, it is said, was basely assassinated on the streets of Laredo, Tex., by persons who fled to Mexico. On behalf of citizens of Laredo, Mr. Crain requested the state department to take steps looking to the extradition of the assassins. That portion of the secretary's letter deemed pertinent to the present question reads as follows:

"'The department regrets that the present conventional relations between the United States and Mexico do not admit of a demand for the extradition of the assassins, since it is stated they are citizens of Mexico. Present treaty provides that neither of the contracting parties shall be bound to deliver up its citizens, and, as this clause has been held to preclude the surrender of a citizen of the United States, Mexico refuses to give up her citizens. This question was last agitated in the well-known case of Alexander Trimble and his associates, who were charged with murder and robbery in 1884. They were arrested in Texas with a view of their extradition by the authorities of that state, and when the case was reported to their government, and the fact of their citizenship of the United States was disclosed, this department interfered, and they were discharged. In view of this,

and several prior and subsequent cases in which a similar construction has been given to the treaty, this government is precluded from demanding the extradition of the fugitives in the present instance.'

"*Thus it appears that, extending through a period of 17 years, 4 different administrations of the federal government have invariably held that no authority was conferred upon the executive, by the sixth article of the treaty, either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States, or to surrender an American citizen upon demand made by the Republic of Mexico.* Following the construction so consistently applied to the treaty, the executive department, whose appropriate duty it is to execute the treaty pursuant to its stipulations and statutory requirements, has uniformly refused to surrender our own citizens; and it may be well said, if doubt exist as to the true construction of the treaty, which the court freely admits is not entertained in the present case, this contemporaneous and uniform interpretation 'ought to turn the scale.' So far as the court is advised, there is but one opinion of the question by law-writers and the executive department of our own country." (pp. 378, 9, italics ours.)

In addition to the well reasoned opinion in the *McCabe* case, there is the decision of this Court in the case of *Charlton* v. *Kelly, supra.* The authority of that decision for the construction of this Treaty for which we contend may not at first glance be apparent. But a considered analysis of the opinion of this Court will establish it as a very direct authority in our favor, as it was considered by a majority of the Circuit Court of Appeals herein.

In that case Charlton, an American citizen, opposed his extradition to Italy upon the charge of murder under the Treaty with Italy of 1884. The Treaty simply provided for the extradition of all "persons" and did not contain the provision that neither party should be bound to surrender its own citizens. It therefore purported to impose an un-

limited obligation to extradite alien and citizen alike. Italy, however, over the objection of the Government of the United States, had consistently refused to extradite its own nationals. Charlton's counsel argued that Italy's refusal to extradite its own nationals under this Treaty constituted a breach of the Treaty which relieved the American Government of any obligation to extradite its own citizens thereunder. Counsel then maintained, as we do here, that in the absence of an obligation imposed by the Treaty to extradite American citizens, the Executive lacked the constitutional power to extradite them.

This argument was thus disposed of by this Court:

(a) That, regardless of the breach of the Treaty by Italy, in the absence of renunciation thereof by the United States (which had not taken place), it remained in full force and effect;

(b) That the Treaty, by calling for the extradition of all "persons", without the qualification that neither party should be bound to extradite its own citizens, obligated the United States to extradite its own citizens; that, in view of the existence of an express obligation assumed by the United States to extradite its own citizens, among others, the constitutional argument, that it would be a violation of due process of law to extradite an American citizen in the absence of an express obligation to do so, did not apply.

However, in the opinion of the Court, the view was clearly expressed that American treaties which contain the provision that neither party shall be bound to deliver up its own citizens expressly exclude, exempt and except American citizens from their operation.

Upon the question as to the meaning of the word "persons", unmodified by subsequent words of limitation, in an extradition treaty the Court said:

> "We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citi-

zens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, *the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not.* Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of 'persons', without limitation or qualification are the following:

With Great Britain, August 9, 1842, extended July 12, 1889, United States Treaties, 1910, pp. 650 and 740.

With France, November 9, 1843, supra, p. 526.

With Italy, February 8, 1868, supra, p. 961.

With Venezuela, August 27, 1860, supra, p. 1845.

With Ecuador, June 28, 1872, supra, p. 436.

With Dominican Republic, February 8, 1867, supra, p. 403.

The Treaty with Japan of April 29, 1886, supra, p. 1025, contains a qualification in these words:

'Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so.'

The conclusion we reach is, that there is no principle of international law by which citizens are

excepted out of an agreement to surrender 'persons', where no such exception is made in the treaty itself. Upon the contrary, *the word 'persons' includes all persons when not qualified as it is in some of the treaties between this and other nations.* That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word 'persons'. This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, §138, where he says:

"'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons' or 'all persons'. Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: *'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered.* Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used." (pp. 466 to 468, italics ours.)

It will thus be seen that this Court, following in effect the *McCabe* decision and the authorities therein cited, places our extradition treaties in two classes:

> "those which expressly exempt citizens, and those which do not." (p. 467.)

Of the extradition treaties of the United States in force in 1910, six were in the second of the two classes defined by the Court, and contained no limitation as to the persons extraditable thereunder.

All the remaining treaties were placed by this Court in the first of the two classes, as those treaties which expressly exempt American citizens. Of such treaties, sixteen contained a clause in exactly the same language as the French Treaty of 1909. Two provided that neither of the contracting parties should be *obliged* to surrender its own citizens, and one provided that the contracting parties should not be *required* to surrender its own citizens. The remaining seven contained a provision similar to that in the Japanese Treaty, mentioned by this Court, reading:

> "Neither government shall be bound to deliver its own citizens for extradition under this convention; but either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

This Court thus placed all of these Treaties, except the six first above mentioned, in the same category, as expressly exempting American citizens from their operation It also assimilated even those Treaties which purported expressly to confer a discretionary power upon the American government or executive, to those Treaties which it characterized as exempting citizens from their operation.

In any event, no extradition treaty in force in 1910 contained an exemption of American citizens in stronger language than that contained in the French Treaty of 1909, and therefore, that Treaty, and the many others containing the same clause, must necessarily be included among

those treaties which this Court referred to as stipulating "that the citizens or subjects of the parties shall not be surrendered."

In its opinion this Court, in effect, concurs in the following view so precisely expressed by the District Court in the same case:

> "In thirty-one of the thirty-six treaties made by this Government with foreign countries, in which the word 'persons' is used, there have been inserted specific clauses *expressly excluding from the operation of such treaties,* the citizens and subjects of such countries."
>
> (185 Fed. Rep. 880, at 886.)

The five Treaties to which reference is there made are those mentioned in the opinion of this Court, to wit, the Treaties with Great Britain, Italy, Venezuela, Ecuador and the Dominican Republic, which contain no limitation of persons extraditable thereunder. *The remaining thirty-one, which are thus held to expressly exclude American citizens, obviously include the treaties such as the present French Treaty.*

It is apparent, therefore, that the decision in the *Charlton* case is direct authority for the proposition that the provision in an extradition treaty that neither of the contracting parties shall be bound to surrender its own citizens, constitutes a qualification of and limitation upon the word "persons" as used in such treaty, and expressly exempts and excludes American citizens from the operation thereof.

The majority opinion below expressly agrees with our interpretation of this Court's opinion in the *Charlton* case. However, both the dissenting opinion below and the petitioners' brief herein, while relying upon that decision for certain fundamental propositions of extradition law, completely ignore its obvious authority in our favor.

However, even if the foregoing decisions were not deemed to be direct and binding judicial authority for the construction of this Treaty as exempting American citizens from its

operation, the same conclusion would be arrived at *a priori* by a consideration of the determining factors in the construction of such a treaty; to wit, the intention of the parties as evidenced by the practical construction which they have consistently placed thereon.

As is pointed out in both of the foregoing decisions, the practical construction placed by the Executive upon a treaty is of almost compelling force, in the absence of other standards of interpretation.

The principle is thus restated in the recent case of *Sullivan* v. *Kidd*, 254 U. S. 433, at 442:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight. Charlton *v.* Kelly, 229 U. S. 447, 468. See also Castro *v.* De Uriarte, 16 Fed. Rep. 93, 98 (opinion by Judge Addison Brown)."

The provision of the French Treaty of 1909 is contained in the identical or substantially identical language in the great majority of our extradition treaties. One of the earliest in which it is found was the Treaty between the United States and Mexico of 1861, which employed the following language:

> "Neither of the contracting parties shall be bound to deliver up its own citizen under the stipulations of this treaty."
> (Article VI, *Malloy, Treaties,* Vol. 1, p. 1127.)

The fact of the contiguity of Mexico to the United States gave rise to the early establishment of an executive policy and construction with reference to this clause of the Treaty.

Illustrations of the consistent interpretation of this clause by the Executive Department of the United States are fully set forth in the opinion in the *McCabe* case, *supra*, commencing at p. 378, leading to the following conclusion arrived at by Judge Maxey:

> "Thus it appears that extending through a period of 17 years, [from 1874 to the date of the decision], 4 different administrations of the federal government have invariably held that no authority was conferred upon the executive, by the Sixth article of the Treaty * * * to surrender an American citizen upon demand made by the Republic of Mexico." (p. 379.)

Judge Moore, whose authority upon the subject of extradition was recognized by this Court in the *Charlton* case, makes the following comment upon the position of the Government of the United States with regard to such a clause:

> "Section 135. Case of *Trimble*. The question of the power of the Government of the United States to surrender its citizens under the Treaty with Mexico, was elaborately discussed in 1884, in the case of Alexander Trimble, an American citizen whose extradition was demanded on charges of robbery and murder. The Government of the United States declined to order his surrender, on the ground that, *as the Treaty negatived any obligation to do so, the President was not vested with legal authority to act. To this position the Government of the United States has adhered.*" (Moore, Extradition, Vol. I, § 135, italics ours.)

Moreover, the provision exempting American citizens first appeared in an American extradition treaty in 1852, in the Treaty with Prussia, which provided in Article III thereof:

> "None of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

In the very preamble to that treaty is found an expression of the purpose of incorporating such a restrictive clause, thus:

> "* * * The Government of the United States, *with a view of making the convention strictly reciprocal*, shall be equally free from any obligation to surrender citizens of the United States. * * *" (Malloy, Treaties, Vol. 2, pp. 1501-2, italics ours.)

We thus find in the terms of the very first treaty embodying the mooted clause, the expressed view of the treaty-making power of the United States that such clause renders the United States

> "free from any obligation to surrender citizens of the United States."

There has been no deviation from this construction by the Executive Department of the Government of the United States.

In conclusion upon this point, it will be observed that the American position with respect to the interpretation of the language of Article V of this Treaty, is based upon the lack of power in the Executive to extradite an American citizen in the absence of a binding obligation imposed by treaty. Such lack of power results from the constitutional limitations upon both the Legislative and Executive Departments under the American system of government.

Reliance was placed by the petitioners and by the dissenting Judge in the Court below, upon the decision of the English Court of Queens Bench in the case of *In Re Galwey* [1896] 1 Q. B. 230, in which it was held that a provision of the Extradition Treaty between Great Britain and Belgium, similar in language to that here involved, authorized the British Government to deliver up British subjects.

Quite aside from the fact that the decision of the English Court conflicts with the foregoing American authorities, and can thus furnish no guide, the vital points of distinction are that the *Galwey* decision was rendered in a country

where the Government is not subject to the constitutional limitations existing in the United States, and that, moreover, the reasoning of the English Court in reality tends to sustain our own view. We shall discuss and distinguish the *Galwey* case in its proper position in Point III of this Brief.

Reply to Petitioners' Points "II", "IV" and "V".

We submit that if it were not for the decision of the English Court in the case of *In re Galwey* and the *ad hominem* argument that the construction adopted by the majority of the Circuit Court of Appeals in this case is "repugnant to justice", there would not be sufficient basis for even a colorable argument in favor of the petitioners.

In Point II of their brief herein, the petitioners say that there are thirty-two other extradition treaties containing this same clause, and that if the majority of the Circuit Court of Appeals in the instant case are correct, then American citizens in every one of these countries may commit crime with the same immunity as is now claimed in respect of crimes committed in France. To this we reply that when each one of those thirty-two treaties was entered into the American Government knew exactly the meaning of the words which were employed, and it employed them advisedly and with the intention that they should have the very meaning for which we contend.

The American Government did not desire to exempt American citizens from extradition to the countries involved in those treaties but it was compelled to do so because the other countries involved insisted upon exempting their own citizens. The United States has never considered that the trial of their own citizens by those countries for crimes committed abroad was an acceptable substitute for extradition. In discussing the proposed Treaty with Venezuela signed at Caracas on June 6, 1894, in which a stipulation was inserted to the effect that neither government should be bound to surrender its own citizens, the

Secretary of State objected that such a Treaty *excluded* citizens from its operation and further stated:

> "Although Venezuela may undertake to punish her subjects who, after committing crime here, return within her jurisdiction, yet the means of ascertaining the truth and doing justice must under such circumstances, always be difficult and often unattainable."
>
> (Moore's International Law Digest, Vol. IV, p. 288.)

As is shown by the decision in *Holmes* v. *Jennison,* 14 Peters (U. S.) 574, for a period of approximately forty years prior to 1842, the Government of the United States extradited no one (much less citizens) to foreign countries.

At this very day there are nations with which the United States has no extradition treaties and to which, therefore, no one can be extradited, whether American citizen or alien. This may be considered an unsatisfactory situation, yet no one but the treaty-making power can correct it.

Moreover, the courts are not concerned with abstract principles of theoretical justice in the interpretation of treaties.

> "We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and, having found that, our duty is to follow it as far as it goes, and to stop where that stops, *whatever may be the imperfections or difficulties which it leaves behind.*"
>
> *The Amiable Isabella,* 6 Wheaton, 1 at 71.

In Point IV of their brief the petitioners urge that the present attitude of the Department of State appears to be one of neutrality, at the same time admitting that at all times prior to the decision of the District Judge in these cases in 1935, the State Department appears to have considered itself bound by the *McCabe* decision.

Quite naturally, with the decision of the District Judge in the cases at bar in direct conflict with the decision in the

McCabe case, the State Department was anxious to have this judicial controversy disposed of by the higher courts.

Such attitude of the State Department cannot obscure the fact that in 1909, when the French Treaty was negotiated, it was the established practice of the State Department to construe the clause in question as definitely exempting American citizens.

Petitioners also urge that the practice of the State Department in the construction of such a treaty as this was not, in fact, uniform, because Secretary Frelinghuysen, after having refused to deliver up Trimble to Mexico in 1884, expressed the opinion that the question should ultimately receive judicial determination. However, years later, in 1894, the President of the United States expressed the view, through the Secretary of State, that a treaty which provided that neither Government should be bound to surrender its own citizens *excluded* such citizens from its operation. (*Moore Digest of International Law,* Vol. IV, p. 288.)

Judge Moore, in the quotation set forth at page 23, *supra,* says that the Government of the United States has adhered to the position that under such a Treaty provision the President is not vested with legal authority to extradite an American citizen.

It is at this point that we may give attention to Point V of the Petitioners' argument, in which they attempt to sustain the following proposition

> "The Franco-American Treaty, and other treaties containing similar language, have *regularly* been interpreted by text writers as conferring a discretion on the Executive."

In view of the state of opinion among the text writers upon the subject, this assertion of the petitioners is, to say the least, startling.

We need only refer to the quotations from the opinion of Judge Maxey in the *McCabe* case, *supra,* to establish that

the views of the text writers to whom he there refers are exactly the opposite of those for which the petitioners' contend. His quotations from *Spear* and *Lawrence* show those authors as opposed to the views of petitioners.

At page 377 of the *McCabe* opinion reference is also made to a note to §841 of Wharton Conflict of Laws (Second Edition) which expresses the view that a treaty containing this clause expressly prohibits the surrender of an American citizen. Exactly the same note appears at the same place in the Third Edition of Wharton on Conflict of Laws.

In the "Research in International Law" of the Harvard Law School, 1935, at page 126, upon the subject of extradition, the following note appears:

> "Under the treaties to which the United States is a party and which provide that neither party shall be bound to extradite its nationals, the President has been held without constitutional power to deliver a national of the United States.
>
> *Moore Extradition,* (1891) Vol. I, § 135, pp. 166-167."

In the same work at page 124, note 10, in commenting upon a similar clause in our treaties, it is said:

> "Under such treaty the President has no constitutional power to surrender nationals."

In Vol. VII American and English Encyclopedia of Law and Procedure at page 616 and in 25 C. J. at page 278, it is said that under an American Treaty which provides that neither of the contracting parties shall be bound to surrender its citizens, there can be no such surrender.

In support of their assertion, the petitioners quote only from *Oppenheim* and from two French writers. (Pp. 33-35 Petitioners Brief).

It is quite apparent that none of these authorities purports to express the American point of view. *Oppenheim* was obviously referring only to the British position as

evidenced by the decision in *Re Galwey,* which is hereinafter discussed. As far as the two French writers are concerned, it is rather amusing to note that they speak of the existence of a discretion in the extradition from France of a French citizen, despite the fact that since 1820, at least, it has been impossible to obtain the extradition of a Frenchman from France.

As opposed to the two Law Journal articles referred to by the petitioners at page 5 of their Brief, which are critical of the present state of the law as embodied in the majority opinion below, largely upon the ground that the opposite view would be "functionally better", we may refer to the obviously unbiased and objective statement of the law as set forth in an article in 14 *Boston University Law Review* (1934) at page 610:

> "In most extradition conventions to which the United States is a party there are provisions exempting the signatories from the duty of surrendering their own citizens. Where there is a stipulation in a treaty that neither of the contracting nations shall be bound to deliver up its own citizens or subjects *there can be no surrender.*" (Italics ours.)

POINT II.

It was the intent of the parties in concluding the French Extradition Treaty of 1909 to positively exempt citizens from its operation.

The extradition treaty with France of 1843, which was modified by the Treaty of 1909, contained no exemption of citizens. By 1909, when the new treaty was made including the new provision that neither government should be *bound* to extradite its own nationals, the clause so added had long since acquired a clearly defined and recognized significance as a result of the *McCabe* decision and of many years of consistent interpretation by the Executive Department.

Such interpretation, therefore, is presumed to have been a part of the clause as thus employed. *United States* v. *Faulk*, 204 U. S. 143, at 152; *National Co.* v. *United States*, 252 U. S. 140 at 146; *United States* v. *Cerecedo*, 209 U. S. 337 at 339.

There can be no doubt that the inclusion of that clause in this treaty at a time when it had acquired such definite meaning is practically conclusive as to the intention of the treaty-making power. Surely, the State Department cannot have construed the clause in one sense for the purpose of denying extradition under one treaty, and in a contradictory sense for the purpose of negotiating and concluding another treaty! That the State Department in negotiating a new treaty with France intended to use the clause in its theretofore accepted sense, is clear from a consideration of the background of treaty relations with France, and the contemporaneous state of the extradition law of France.

The French Treaty of 1843 contained no limitation in favor of citizens. Yet no Frenchman had ever been extradited to the United States, for the reason that French municipal law and policy forbade such extradition. It was obviously to correct this anomalous situation and to restore that condition of "strict reciprocity" which has been the foundation of our extradition policy, that the new treaty of 1909 was concluded.

In the light of the French municipal law and the acquired significance of the language employed in Article V of the Treaty of 1909, the inference is irresistible that both parties intended to positively and absolutely exempt their own citizens from extradition.

The consistent position of France with respect to the extradition of its nationals is stated as recently as 1935 by the group of distinguished scholars charged with editing the *Harvard Research on International Law*, Part I, Extradition, at page 123, as follows:

> "The non-extradition of nationals seems first to have arisen as a national policy between the Low

countries and France in the application of mutual ordinances for the surrender of criminals enacted by those two countries in 1736. This was due to the application in the territory of the former, in extradition cases, of the Bulle Brabantine, which guaranteed that the inhabitants should not be withdrawn from the jurisdiction of the local courts. France reciprocated.

"However, during the 18th century France made a treaty with Spain (1765), expressly providing for the extradition of nationals. An imperial decree issued by Napoleon expressly recognized the possibility of extradition by France of French nationals, but provided that a demand for such extradition should be submitted to the Emperor. Billot says that this decree was never given effect, and is supposed to have been nullified by the Charter of 1814, but Bonafos actually produces an Ordonnance d'Extradition of 1820 of a French citizen to the Canton of Geneva.

"In 1834 the rule against the extradition of nationals first found its place in a treaty, the parties very naturally being Belgium and France. Since then this provision has been included in all French treaties, except those made in 1843 with Great Britain and the United States, *but under those two treaties neither Great Britain nor the United States was able to obtain a Frenchman from France. It is interesting to note that France's practice denying extradition of her nationals, was firmly established for many years before her laws provided for their punishment in France for crimes committed abroad* (except crimes aimed at her own safety, money or financial interests). Before the middle of the 19th century the Belgian and French rule against the extradition of nationals was generally adopted on the European continent, whether states acted under treaties or on the basis of reciprocity, where it has persisted and has largely spread to Latin America" (italics ours).

It is true that it was not until the enactment by France of the Extradition Law of March 10, 1927, that French statute law expressly prohibited extradition of French nation-

als, (Harvard Research in International Law, Part I, Extradition, page 125), and that there existed some conflict among the French legal writers as to whether or not the Charter of 1814 prohibited such extradition.

However, the fact that it has been a principle of French public law that a French national could not be extradited, would seem to be clear from the preamble of the French Statute of June 27, 1866, concerning crimes committed abroad by French citizens, a translation of which reads:

> "Since the Charter of 1814, the prohibition against delivering French citizens to be tried by foreign courts, has become an established principle of our Public Law."

The views of Billot, mentioned in the foregoing excerpt from Harvard Research, are confirmed by the following extracts from the opinions of recognized French experts:

> "The refusal of extradition of nationals rests in France upon an old tradition of our national jurisprudence. It can be explained by the influence of the Law of Asylum, so generally recognized in former days as well as by the natural distrust of criminal tribunals formerly barbarous and whose impartiality was extremely doubtful when it came to the trial of foreigners. * * * Since 1830, the non-extradition of nationals is provided in every treaty signed by France. *(The first instance was the treaty with Belgium on November 22, 1834) and the circular of instruction of April 5th, 1841, treats it as a principle of our public law and of international jurisprudence. The same point of view is found in the proposed Law of 1879 on extradition, articles 3 and 5; and in the proposed law of 1900." Despagnet, *Public International Law*, pp. 324-325.
>
> "*(Note: The treaty of January 6th, 1909, between France and the United States, so provides in section 5.)
>
> * * * * * * *
>
> "On principle, all persons indicted or convicted, who seek refuge in a country, should and may be extra-

dited. But three exceptions are recognized by custom or by international treaties." * * *

"The second relates to nationals of the country of refuge." * * *

"Since 1830, we recognize that the rule excluding nationals from extradition had been put in our treaties; and the Circular of Instruction of April 5th, 1841, on the subject of extradition, established as a principle of our public Common Law the principle that sovereigns ought not surrender their nationals." *Garraud, On Criminal Law,* pp. 142, 143, 144.

The Circular of Instruction referred to by both of the foregoing writers was the Circular issued by the Minister of Justice to all District Attorneys of France (Procureurs Generaux) on the subject of extradition, containing the following statement:

"'Extradition of wrongdoers is subject to restrictions, of which you must take notice. *In the first place, sovereigns do not consent to the surrender of their nationals*" (italics ours).

In any event, it is clear that not since 1820 has a French citizen been extradited to a foreign country, even to the United States or Great Britain during the life of the Treaties of 1843, containing no exemption of citizens.

As recently as March 1923, the Government of France refused the extradition to the United States of one Mooney, a French citizen, who was charged with the commission of a burglary in the City of New York.

It is entirely clear that it is today the practice of France, as well as the express written law of France that a French national cannot be extradited. It is equally clear that this has been the consistent practice of the French Government since 1820. While it is not material in our view of the matter, we maintain also that it was the law of France at the time when the Treaty of 1909 was ratified, that a French national could not be extradited to the United States.

In devoting so much attention to the French law we are not unmindful of the conclusion of this Court in the *Charlton* case to the effect that the construction of an extradition treaty by a foreign government is entitled to little weight as against a contrary American construction. Our primary purpose in doing so is to explain the undoubted motives of the two governments in effecting a modification of the long standing Treaty of 1843. It is apparent from the foregoing exposition of French extradition law that the French Government must have intended to bring its extradition treaty obligations within the limitation of its internal extradition law and policy. It accomplished this by concurring in the use of language which as a result of many years of American interpretation had acquired a clearly defined meaning as excluding citizens.

That this reasoning is well founded is evidenced by the unsuccessful effort of France to induce the United States to accept the French construction of the earlier Treaty as exempting citizens. (*Moore, International Law Digest,* Vol. IV p. 298.)

Moreover, when the Extradition Treaty with France was made in 1909, there were already in existence seven extradition treaties containing the provision that, whereas neither contracting party should be bound to deliver up its own citizens for extradition under the Treaty,

> "either shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."

These were the Treaties with Japan, of 1886, with Argentina, of 1896, with the Orange Free State, of 1896, with Mexico, of 1899, with Guatemala, of 1903, with Nicaragua, of 1905 and with Uruguay of 1905.

With these seven definite precedents existing at the time of the making of the French Treaty of 1909, is it likely that if the treaty making power of the United States had intended that there should exist any discretion in the American Government to extradite American citizens to France, it would

not have employed exactly this language in the French Treaty? By failing to employ this language and by using the same clause which already existed in fifteen other extradition treaties, and which had been construed by the Courts and by the Executive Department as preventing the extradition of American citizens, the intent would seem to be clearly manifested that there should be no discretion in the extradition of American citizens under the French Treaty.

We have seen that the Mexican Treaty of 1861, which contained exactly the same exemption as the French Treaty of 1909, was the subject of the interpretation of the Executive Department and of the Court in the *McCabe* case, *supra*, which denied the power of the Executive to extradite American citizens thereunder. In 1899, however, a new treaty with Mexico was concluded, in which it was provided that either of the contracting parties should have the power to extradite its own citizens in its discretion. If the American treaty-making power had considered that the treaty as it previously stood granted discretion in the matter of the extradition of American citizens, is it conceivable that it would have thus changed the Treaty?

Since the decision of this Court in the *Charlton* case, the United States has entered into sixteen new Extradition Treaties, in addition to the new treaty with Great Britain of December 22, 1931. The new Treaty with Great Britain, of course, contains no limitation as to the persons extraditable thereunder. Every other one of the new treaties thus made contains a clause substantially identical with that of the French Treaty of 1909. These Treaties are as follows:

With Paraguay, of 1913,
" Costa Rica, of 1922,
" Siam, of 1922,
" Venezuela, of 1922,
" Esthonia, of 1923,
" Latvia, of 1923,
" Bulgaria, of 1924,
" Finland, of 1924,
" Lithuania, of 1924,

With Rumania, of 1924,
" Poland, of 1927,
" Germany, of 1930,
" Austria, of 1930,
" Greece, of 1931,
" Albania, of 1933, and
" Iraq, of 1934.

If the American Government had intended to change its attitude with respect to the lack of discretion, it seems reasonable to suppose that instead of employing this clause unaltered in these new recent treaties, it would have added the same words found in the Argentine and other treaties to the effect that the government, through Congress and the President, should have a discretion in the matter.

The definite intent of the treaty-making powers of both the United States and France, to expressly exempt citizens from the operation of the Treaty of 1909, is, in our view, clearly established.

Reply to Petitioners' Points III and VI.

Point III of Petitioners' Brief is given over to a very labored attempt to prove that at the time of the negotiation of the Franco-American Extradition Treaty of 1909 France, at least, did not intend that the use of the phrase—

> "neither of the contracting parties shall be bound to deliver up its own citizens"

should exempt the nationals of the respective parties from the operation of the treaty.

We are unable to find in this point anything except a very strong argument in favor of our own position. Bearing in mind that the public policy and in reality the public law of France prohibited the extradition of a French citizen, consider the following quotation which the petitioners have cited from the exposé des motifs accompanying the American Treaty before the French Parliament:

> "Article V. gives to the two contracting parties the right not to deliver their nationals. This general

> principle, *which is part of our public law*, did not appear expressly in our previous treaties with the United States. The insertion of this provision has seemed useful to prevent any difficulty of interpretation." (Petitioners' Brief, p. 19.)

That the "difficulty of interpretation" had arisen out of the French efforts to obtain a construction of the old Treaty as exempting nationals, appears from the despatch of the Secretary of State cited at page 298 of Volume IV of Moore's Digest of International Law.

If, as is thus stated, the provisions of Article V of the Treaty were included to conform the Treaty with the general principles of French Public Law, then it must have been intended to exempt nationals from the operation of the treaty. In view of the state of the French Law in 1909, as set forth in the authorities, *supra*, it seems to us rather disingenuous to suggest that the French Government intended at any time to exercise any discretion with respect to the extradition of its own nationals to the United States.

Petitioners also quote at page 19 of their Brief from the exposé des motifs which accompanied the Franco-British Treaty of 1908 before the French Parliament. The language of that Treaty was that the parties—

> "shall be at liberty to refuse to the other the extradition of its own nationals."

In describing the purpose of this language to Parliament, the French Government said that it would—

> "permit the British Government to make possible by the extradition of its nationals the repression which it cannot exercise itself; * * *."

If the French Government considered that the purpose of the two Treaties was the same, why did it not say so in these exposé des motifs? Moreover, why did it not use the same language in the two treaties? The obvious answer

is that the phrase "shall be bound" was an American phrase, inserted at the insistence of the American Government and with the intent to exempt American nationals from the operation of the treaty.

In Point "VI" of their argument the petitioners, with illustrations from all of the Extradition Treaties made by the United States from 1789 to date, argue that the treaty-making power, instead of providing in this treaty that—

> "neither of the contracting parties shall be bound to deliver up its own citizens",

should have said that citizens of the asylum state—

> "shall not be surrendered",

if it intended to leave "no opportunity for discretion".

The primary defect in this argument lies in the fact that the treaty-making power, in order to accomplish its purpose, had only to pluck from existing extradition treaties a clause which through long usage had acquired an undisputed significance. The diplomatic draftsman, no less than his fellows in other fields, is prone to prefer time honored phraseology when suitable to his purpose. As the majority of the Circuit Court of Appeals has so aptly stated in this case:

> "* * * we are dealing with a clause chosen by the President and Senate out of the diplomatic locker and encrusted with its proper traditions, which in such matters account for much" (81 Fed. (2) 35).

Petitioners suggest in support of this point that the State Department might have followed the precedent of the Treaty of 1855 with the two Sicilies. It should suffice to know, however, that this Treaty was superseded in 1868 by the Treaty with the Kingdom of Italy and was therefore not available in the diplomatic locker in 1909 (IV Moore, International Law Digest, 295).

Moreover, Judge Manton himself, in the article in the *Temple Law Quarterly* hereinbefore referred to, assimilates the clause—

"no Government shall be bound"

to the clause—

"shall not deliver up",

by characterizing both as prohibitions against the extradition of nationals:

> "When we study the treaties concluded between nations, we find in most of them, the same policy of opposition to the extradition of nationals. *Generally, the prohibition is framed something like this:* the contracting states agree to give up criminals 'with the sole exception of their nationals' (a la seule exception de leurs nationaux); or except when 'the person claimed is a native or citizen of the country, to whose government the request is made'; or 'but *no Government shall be bound to grant the extradition of its own citizens'*; or 'excepting subjects'; *or 'shall not deliver up' a citizen.*"
>
> (Temple Law Quarterly, Vol. X [Nov. 1935], pp. 13, 14, italics ours).

POINT III.

A construction of the French Extradition Treaty of 1909 as vesting discretion in the Executive to extradite American citizens, would be unconstitutional.

It is a fundamental principle of American Constitutional law that a treaty, as well as a statute, must not conflict with the positive prohibitions of the Constitution.

In the *Cherokee Tobacco case,* 11 Wall (U. S.) 616, at page 620, it is held:

> "It need hardly be said that a Treaty cannot change the Constitution or be held valid if it be in

violation of that instrument. This results from the nature and fundamental principles of our Government."

In *Doe* v. *Braden*, 57 U. S. 635, at page 656, the following appears:

"The Treaty is therefore a law made by the proper authority and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the constitution of the United States."

To the same effect is *Geoffroy* v. *Riggs*, 133 U. S. 266.

At page 160 of *Crandall on Treaties*, authorities are collated which establish clearly that a Treaty is the equivalent of an Act of Congress, whenever it operates of itself without the aid of any legislative provision. At page 246 thereof the following limitation, as expressed by Calhoun, is quoted:

"Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its two limits, such regulations are not inconsistent with the Constitution. If so they are void. No treaty can alter the fabric of our government, nor can it do that which the Constitution has expressly forbade to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited."

(Crandall, Treaties, Their Making and Enforcement (Second Edition) p. 246).

We may assume, therefore, *arguendo*, that the provisions of an extradition treaty to the effect that neither party shall be bound to surrender its own citizens, is susceptible of the construction placed thereon by the British Court in the *Galwey* case, and that as so construed it vests in the Executive Department of the Government a discretion as to such surrender.

If so, by what standard is the Executive to be guided in the exercise of this discretion as between American citizens,

charged with extraditable offenses under the Treaty? Is it not entirely clear that under such an interpretation of the Treaty the discretion of the President would be absolute and unfettered? Could not the President, under such an interpretation, exercise an arbitrary discretion to extradite one American citizen and, at the same time, refuse to extradite another similarly situated?

Is it not obvious, therefore, that to vest such a discretion in the President would be, in effect, to *delegate to him alone the treaty-making power*, which, by the Constitution, is vested in the President and the Senate?

There can be no doubt that to vest a similar discretion in the President by statute would be an unlawful delegation of the legislative power, in violation of the provisions of Article I, Section 1 of the Constitution, because of the absence of any standard for the exercise of such discretion.

In the recent decision of this Court in the case of *Schechter* v. *United States*, 295 U. S. 723, in concluding that the National Industrial Recovery Act was unconstitutional in that it contained an unlawful delegation of the legislative power, the Court stated the controlling principle as follows:

> "To summarize and conclude upon this point: § 3 of the recovery act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.
>
> Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in § 1.
>
> In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.

> We think that the code making authority thus conferred is an unconstitutional delegation of legislative power'' (p. 901).

There can be no difference in principle between the unconstitutional attempt to delegate an unfettered discretion to the Executive Department by legislation and a similar attempt by treaty. A treaty is by our Constitution made the equivalent of an Act of Congress. The treaty powers are vested in the President and the Senate concurrently. For the Senate and the President acting concurrently by a treaty to attempt to delegate to the President alone the Treaty making power, must be as objectionable under the Constitution as an unlawful delegation of the legislative function.

The more serious constitutional objection, however, to a construction of this Treaty which would vest in the Executive Department an unfettered discretion in the extradition of American citizens, is found in the Fifth Amendment to the Constitution, requiring due process of law. It will serve no useful purpose to collate the authorities upon what does and what does not constitute due process of law in connection with the personal liberty of an individual. It is sufficient to note that the President of the United States has no express or implied power, in the absence of Treaty or legislation, to deport from the United States any person, whether citizen or not.

To provide by Treaty that the President must deport by extradition, non-citizens, under certain conditions fixed by the Treaty, but that he shall have an absolute discretion, unguided by any standard, to deport or to refuse to deport an American citizen, is quite clearly to place in the hands of the President an *arbitrary* power over American citizens.

In *Giozza* v. *Tiernan*, 148 U. S. 657 a standard directly applicable to the present situation was thus stated:

> "Due process of law within the meaning of the Amendment is secured if the laws operate on all

> alike, and do not subject the individual to an arbitrary exercise of the powers of government" (p. 662).

To subject an American citizen to an arbitrary exercise of the discretion of the Executive, would thus constitute the clearest deprivation of due process of law, because it would render possible an arbitrary "discrimination in favor of one as against another of the same class" (*Giozza* v. *Tiernan, supra,* p. 662).

In the *McCabe* case, *supra,* the lack of power in the Executive to extradite in the absence of a positive treaty obligation, is placed, as it should be, upon constitutional grounds, as follows:

> "If it were otherwise, if the Executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American Constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station" (p. 375).

It may be suggested that the inclusion in four of our extradition treaties (those with Guatemala, 1903; Mexico, 1899; Nicaragua, 1905; Uruguay, 1905) of the clause providing that the Executive authority shall have the power to deliver up its own citizens, if, in its discretion, it be deemed proper to do so, evidences the view of the treaty-making power of the United States that such a discretion may be lodged in the Executive Department of the American government.

If, by this suggestion, it is meant that the Executive may arbitrarily choose between two American citizens, in all respects similarly situated, for purposes of extradition, then we insist that this language must fail of its purpose

because of the constitutional limitations hereinbefore discussed.

Moreover, the full constitutional argument as to the lack of any discretion in the Executive Department of the American Government to extradite an American citizen in the absence of a direct treaty obligation, was made before this Court in the case of *Charlton* v. *Kelly, supra.* Consequently, the conclusion of the Court that all our treaties, except those containing no modification of the word "persons", are to be classified as expressly exempting American citizens from their operation, must clearly be deemed to have been made with a full knowledge of the constitutional questions involved, and to have included in this category even those four treaties in which a discretion is sought to be expressly given to the American Executive. If this Court had not had this view in mind, it would necessarily have classified these four treaties in a third category in which a discretion rested with the Executive in the matter of the extradition of American nationals.

The petitioners argue that the Extradition Statute, in giving the Executive the final word on extradition in every case, confers an arbitrary discretion upon him similar to that which Petitioners seek to read into the French Treaty. Suffice it to say, that the so-called discretion exercised by the Executive under the Extradition Statute is no more than a quasi-judicial function, far removed from the arbitrary discretion here contended for.

In the very opinion of the Attorney General to which petitioners refer at page 13 of their Brief, it is said:

> "I am of the opinion that the proceedings below come before you [The Secretary of State] upon a *quasi certiorari*, and that your discretion extends to a *review* of every question therein presented."
>
> (17 Op. Atty. Gen. 184, 185, italics ours.)

To this effect also are *In re Stupp*, 23 Fed. Cas. 296 at 302, and *In re Ezeta*, 62 Fed. 972 at 996.

Reply to Petitioners' Points "I" and "VII".

A discussion of these two points of the Petitioners' argument requires only a consideration of the *Galwey* case decided by the Queen's Bench Division of the English High Court of Justice and of its possible application as an aid in the interpretation of this Treaty.

The primary reason for its inapplicability in the case at bar is admirably stated in the majority opinion below. In our view there are additional reasons why the decision can have no bearing upon our problem. We shall therefore discuss it under the three following heads:

(a) It was rendered under a constitutional system peculiar to England and different from our own.

(b) It was based upon an Extradition Law peculiar to England and upon evidence of a different intent in the treaty-making power.

(c) It conflicts with controlling American judicial authority.

a.

The fundamental difference between the British and American constitutional system is explained in detail by this Court in the case of *Hurtado* v. *United States*, 110 U. S. 516 at 531, as follows:

> "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against common right and reason.

The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."

It will thus be seen that in the English Constitutional system there is no limitation upon the legislative power and that consequently the British Parliament may, by legislation, delegate to the executive unfettered, discretionary power. This, as we have seen, cannot be done in the United States under our constitutional system.

Consequently, in the interpretation of English statute and treaty, the Courts are not constrained to interpret them so as to conform with constitutional prohibitions against delegation of legislative power and deprivation of due process of law.

It is obvious, therefore, that a decision rendered under such an entirely different constitutional system can be of little or no persuasive force in the United States, as against

the positive prohibitions of the Constitution. That such is the view of the Supreme Court, appears in *U. S.* v. *Rauscher*, 119 U. S. 407:

> "The only English work on the subject of extradition we have been able to find which discusses this subject is a small manual by Edward Clarke of Lincoln's Inn, published in 1867. He adopts the same view of the construction of this treaty and of the general principles of international law upon the subject which we have just indicated.
>
> "Turning to seek in judicial decisions for authority upon the subject, as might be anticipated *we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government.* Speaking of the Ashburton Treaty of 1842, which we are now construing, Mr. Clarke says, that, 'In England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an Act of Parliament, but in the United States a treaty is as binding as an Act of Congress.'" Clarke on Extradition, 38" (p. 417, italics ours).

The group of scholars, who in 1935 edited the Harvard Research in International Law, *supra*, recognize a clear distinction, upon constitutional grounds, between the British and American law in this regard. They state in the following quoted passage, that under British law a treaty provision declaring that no party is compelled to extradite its nationals, leaves the Executive power freedom of action in the matter, but that under American law, a similar treaty clause leaves the American Executive without constitutional power to surrender an American citizen:—

> "Great Britain and the United States have favored the extradition of nationals. To meet the

> desires of other contracting parties, however, Great Britain has at times put clauses in extradition treaties forbidding surrender of nationals, but she has recently been substituting for such provision a clause declaring merely that no party is compelled to extradite its nationals, thus leaving to herself freedom of action in the matter. 'In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own nationals. The attempt has, however, rarely been successful * * *'. In several instances during the middle of the last century, negotiations were broken off by the United States because of the fact that the other country refused to surrender its nationals. *Nevertheless, to facilitate extradition so far as it is possible, we have come to accept a clause providing that the parties are not under a duty to extradite their nationals when other States insist upon it*" (italics ours.)

In a note to the italicized sentence, it is stated, upon the authority of Moore on Extradition:—

> "under such treaty the President has no constitutional power to surrender a national."
>
> (Harvard Research in International Law, Part I, Extradition, p. 124 and note 10.)

It is thus shown that, under the English system, the scope of the power of extradition, which may be absolute and arbitrary, must be sought for in an Act of Parliament. If an Act of Parliament grants a broad and even arbitrary power to the executive authority in the matter of extradition, and if the treaty making that Act applicable to a foreign state does not expressly curtail such broad power then the broad power continues to exist unimpaired. That is the exact situation which was found to exist in the *Galwey* case.

The English Extradition Act of 1870, in Section 6 thereof, provides that where that Act is made to apply by treaty in

the case of any foreign state, every fugitive criminal of that state, who is in or suspected of being in that part of Her Majesty's Dominions covered by the treaty, shall be liable to be apprehended and surrendered in the manner provided by the Act. It is at once apparent that this Act creates a power in the executive to surrender for extradition any person, whether a British subject or not. It confers upon the executive authority the broadest possible power, without constitutional limitation, except that some Treaty must exist making the statute applicable to the foreign state demanding the fugitive.

Fundamentally, therefore, in the *Galwey* case the Extradition Act of 1870, permitting the extradition of a British subject or alien, was applicable because a treaty did exist between Great Britain and Belgium. The only consideration was as to whether or not it was the intention of the Belgian Treaty to cut down the broad power existent in the executive so as to expressly prohibit the extradition of British subjects. The intent of the treaty making power in this regard was considered in the light of the history and peculiar background of the existing Belgian Treaty. The Court concluded, in effect, that the original treaty was altered for the purpose of *enlarging its scope* so as to include British subjects.

b.

The Extradition Treaty between Great Britain and Belgium in force in 1876 contained the following stipulation:

> "* * * it is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons * * * *except as regards Great Britain, native born and naturalized subjects of Her Britannic Majesty.*" (Italics ours.)

In 1877, the British Courts in interpreting similar language in a Treaty with Switzerland, concluded that this

language expressly cut down the broad power of extradition granted to the British executive by the Extradition Act of 1870. In arriving at this conclusion the Court said:

> "It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country."
> (*Reg.* v. *Wilson*, 1877, 3 Q. B. 42, at 46.)

After that decision, and in 1887, the Treaty with Belgium was modified and the words above set out which expressly excepted the subjects of the respective contracting parties, were replaced by the provision that neither of the contracting parties should be bound to surrender its own subjects.

Upon this history, the British Court in the *Galwey* case, quite properly concluded that it was the clear intention of the treaty-making power by the modification of the Belgian Treaty made in 1887 to follow the Court's suggestion in *Regina* v. *Wilson*, and to leave the matter of extradition of its own nationals one of discretion in the Executive.

The following excerpts from the argument of counsel for the government and from the opinion of the Court in the *Galwey* case establish the foregoing conclusion:

Argument of Counsel for the Government, p. 232:

> "The treaty of 1876 with that country did no doubt contain an exception which prevented the extradition of British subjects; and under very similar excluding words in the treaty with Switzerland, the case of Reg. *v.* Wilson was decided in 1877 where the court expressed regret that they were prevented by the terms of that treaty from surrendering a British subject accused of offenses in a foreign country. *In consequence, no doubt, of that decision and of the expression of opinion by the court, the declaration in 1887 was signed by the British and Belgian governments.* The language of that declaration is practically the language used by Field, J., at the end of his judgment in Reg. *v.* Wilson (1), and its effect is not to create or to continue a prohibition against the surrender of a British subject, but to vest in the Executive Government a discretion as to such surrender."

Opinion of Court, p. 234:

"The question for *our* determination turns upon the construction of the Extradition Act, 1870, into which and in connection with which are to be read the terms of the treaty. Now the treaty, originally made in 1872, was modified in 1876, and, as modified, it contained this stipulation: 'it is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons'—then follows these words, for which I cite the passage—'except as regards Great Britain, native-born and naturalized subjects of her Britannic Majesty.' Now, as the treaty then was, assuming that Reg. *v.* Wilson (1) was properly decided, the Extradition Act would not have authorized the extradition of the criminal, because from the liability to extradition were excepted native-born and naturalized subjects of the Queen. That Reg. *v.* Wilson (1) decides, and I think, rightly decides. I do not stop to inquire whether, even if the treaty did not apply, there might not have been some other steps taken by the executive government with a view to extradition. That being the original form of the treaty, *it was subsequently altered, and it is quite probable, as was suggested by the Attorney-General in argument, that it was altered because of the decision of Reg.* v. *Wilson* (1), or other decisions to the same effect; for in Reg. *v.* Wilson (1) Cockburn, C. J., expresses regret that this country should not be enabled under the extradition law then existing to deliver up in proper cases even British subjects who have offended against the laws of another country. *Accordingly, in 1887, the treaty was designedly altered;* the excepted words—that is to say, the exception which excluded native-born and naturalized subjects of the Queen altogether from extradition under the statute and the then existing treaty—were altered thus; the words I have mentioned were excluded, and the following substituted: 'In no case nor on any consideration whatever shall the high contracting parties be bound to surrender their own subjects whether by birth or naturalization.' What does that mean? It

surely means that, while they are not bound, *they may under the treaty and any legal enactment which relates to the treaty make such extradition.*" (Italics ours.)

In the *Galwey* case, therefore, the Court was seeking the intent of the treaty making power and found it in the history of the treaty in question.

We must, as did the British Court, seek the intention of the treaty making power. We find it to be contrary to that in the *Galwey* case, basing it upon the same factors, namely, the expressions of the Executive and the decisions of our courts. As we have already pointed out, the intention of our Treaty making power to exempt American citizens is clear from the fact that the exemption clause was included in the Treaty in 1909, at a time when the meaning of the clause had been clearly established by executive construction and judicial decision.

The *Galwey* decision is thus distinguishable upon either or both of two grounds:

First: The Court was interested solely in ascertaining the intent of the treaty making power and deciding accordingly. In this respect the decision is in our favor. By a parity of reasoning the Court would have been compelled to the conclusion for which we contend under the French Treaty. In the one instance, a limited treaty had been liberalized. In the other, an unlimited treaty had been curtailed by the addition of language which had acquired a well defined and limited meaning.

Second: While the construction placed upon the Treaty by the British Court was doubtless proper in Great Britain, such a construction placed upon an American treaty would render the treaty unconstitutional.

c.

The mere fact that the decision in the *Galwey* case was contrary to the American decisions in *Charlton v. Kelly* and

In Re McCabe, supra, would be sufficient, even if it were otherwise persuasive, to destroy its value as a precedent in the United States.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals herein should be affirmed.

October 1, 1936.

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SUPREME COURT OF THE UNITED STATES.

Nos. 6, 7 and 8.—October Term, 1936.

Lewis J. Valentine, Police Commissioner of the City of New York, et al., etc., Petitioners,
6 vs.
The United States of America on the relation of B. Coles Neidecker.

Lewis J. Valentine, Police Commissioner of the City of New York, et al., etc., Petitioners,
7 vs.
The United States of America on the relation of George W. Neidecker.

Lewis J. Valentine, Police Commissioner of the City of New York, et al., etc., Petitioners,
8 vs.
The United States of America on the relation of Aubrey Neidecker.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 9, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Respondents sued out writs of *habeas corpus* to prevent their extradition to France under the Treaty of 1909. 37 Stat. 1526. They are native-born citizens of the United States and are charged with the commission of crimes in France which are among the extraditable offenses specified in the treaty. Having fled to the United States, they were arrested in New York City, on the request of the French authorities, under a preliminary warrant issued by a United States Commissioner and were held for extradition proceedings. By the writs of *habeas corpus* the jurisdiction of the Commissioner was challenged upon the ground that because the treaty excepted citizens of the United States, the President had no constitutional authority to surrender the respondents to the French Republic.

The controlling provisions of the treaty are as follows:

"Article I. The Government of the United States and the Government of France mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offences specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other: Provided That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offence had been there committed.

. . . . . .

"Article V. Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention".

The Circuit Court of Appeals, reversing the orders of the District Judge, sustained the contention of the respondents and directed their discharge. 81 F. (2d) 32. This Court granted certiorari. 298 U. S. —.

First. The question is not one of policy, but of legal authority. The United States has favored the extradition of nationals of the asylum state and has sought—frequently without success—to negotiate treaties of extradition including them.[1] Several of our treaties have made no exception of nationals.[2] This is true of the treaties with Great Britain from the beginning, of the treaty with France of 1843, and of that with Italy of 1868. *Charlton* v. *Kelly*, 229 U. S. 447, 467. Where treaties have provided for the extradition of persons without exception, the United States has always construed its obligation as embracing its citizens. *Id.*, p. 468. In the opinion in *Charlton* v. *Kelly* we alluded to the fact that it had "come to be the practice with a preponderant number of nations to refuse to deliver its citizens" and it was observed that this exception was of modern origin. The beginning of the exemption was traced to the practice between France and the Low Countries in the eighteenth century. And we found that owing "to the

[1] Moore, Int. Law Dig., vol. IV, sec. 594; Moore on Extradition, vol. I, pp. 159-162.

[2] Great Britain, 1794, Art. XXVII, 1 Malloy, Treaties, p. 605; 1842, Art. X, *id.*, p. 655; 1889, *id.*, p. 740; 1931, 47 Stat. 2122; France, 1843, 1 Malloy, p. 526; Italy, 1868, *Id.*, p. 966. See, also, Switzerland, 1850, Art. XIII, 2 Malloy, p. 1767; Venezuela, 1860, Art. XXVII, 2 Malloy, p. 1854; Dominican Republic, 1867, Art. XXVII, 1 Malloy, p. 413; Nicaragua, 1870, 2 Malloy, p. 1287; Orange Free State, 1871, Article VIII, 2 Malloy, p. 1312; Ecuador, 1872, 1 Malloy, p. 436.

existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation". Accordingly we divided the treaties in force into two classes, "those which expressly exempt citizens and those which do not." *Id.*, pp. 466, 467.

The effect of the exception of citizens in the treaty with France of 1909—now under consideration—must be determined in the light of the principles which inhere in our constitutional system. The desirability—frequently asserted by the representatives of our Government and demonstrated by their arguments and the discussions of jurists—of providing for the extradition of nationals of the asylum state is not a substitute for constitutional authority. The surrender of its citizens by the Government of the United States must find its sanction in our law.

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States. *United States* v. *Rauscher*, 119 U. S. 407, 412-414. But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executives to deliver them up".[3] As stated by John Bassett Moore in his treatise on Extradition—summarizing the precedents—"the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power".[4] Counsel for the petitioners do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the

[3] Quoted in Moore on Extradition, vol. I, pp. 22, 23; Moore, Int. Law Dig., vol. IV, p. 246.

[4] Moore on Extradition, vol. I, p. 21.

terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Second. Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory "occupied by or under the control of the United States". Act of June 6, 1900, c. 793, 31 Stat. 656. 18 U. S. C. 652. See *Neely* v. *Henkel*, 180 U. S. 109, 122. Aside from that limited provision, the Act of Congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.[5]

The provision is that—"*Whenever there is a treaty or convention for extradition* between the Government of the United States and any foreign government"—a proceeding may be instituted to procure the surrender of a person charged with the commission of a crime specified in the treaty or convention. Upon the apprehension of the accused, he is entitled to a hearing and, upon evidence deemed to be sufficient to sustain the charge "under the provisions of the proper treaty or convention", the charge with the evidence is to be certified to the Secretary of State to the end that a warrant may issue upon the requisition of the proper authorities of such foreign government, "*for the surrender of such person, according to the stipulations of the treaty or convention*". R. S. 5270; 18 U. S. C. 651.

It is manifest that the Act does not attempt to confer power upon the Executive to surrender any person, much less a citizen of the United States, to a foreign government where an extradition treaty or convention does not provide for such surrender. The question then, is the narrow one whether the power to surrender the respondents in this instance is conferred by the treaty itself.

Third.—It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties. *Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Jordan* v. *Tashiro*, 278 U. S. 123, 127; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293, 294. But, in this instance, there is no question for construction so far as the obligations of the treaty are concerned. The treaty is explicit in the denial of any obligation to surrender citizens of the asylum state—"Neither of the contracting Parties shall be bound to deliver up its own citizens".

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[5] Moore on Extradition, vol. I, p. 50.

Does the treaty, while denying an obligation in such case, contain a grant of power to surrender a citizen of the United States in the discretion of the Executive? The Constitution declares a treaty to be the law of the land. It is consequently, as Chief Justice Marshall said in *Foster* v. *Nielson*, 2 Pet. 253, 314, "to be regarded in courts of justices as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision". See, also, *Head Money Cases*, 112 U. S. 580, 598; *United States* v. *Rauscher*, *supra*, p. 418. Examining the treaty in that aspect, it is our duty to interpret it according to its terms. These must be fairly construed, but we cannot add to or detract from them.

Obviously the treaty contains no express grant of the power now invoked. Petitioners point to Article I which states that the two governments "mutually agree to deliver up persons" who are charged with any of the specified offences. Petitioners urge that the word "persons" includes citizens of the asylum state as well as all others. But Article I is the agreement to deliver. It imposes the obligation of that agreement. Article I does not purport to grant any power to surrender save as the power is related to and derived from that obligation. The word "persons" in Article I describes those who fall within the agreement and with respect to whom the obligation is assumed. As Article V provides that there shall be no obligation on the part of either party to deliver up its own citizens, the latter are necessarily excepted from the agreement in Article I and from the "persons" there described. The fact that the exception is contained in a separate article does not alter its effect. That effect is precisely the same as though Article I had read that the two governments "mutually agree to deliver up persons except its own citizens or subjects".

May a grant to the Executive of discretionary power to surrender citizens of the United States be implied? Petitioners seek to find ground for this implication by comparing the expression in Article V "Neither of the contracting parties shall be bound", in relation to the surrender of citizens, with the phrase in Article VI that "A fugitive criminal shall not be surrendered" if the offence charged is of a political character, and the clause in Article VIII that extradition "shall not be granted" where prosecution is barred by limitation according to the laws of the asylum country. This difference in the phrasing of denials of obligation would be at the best an extremely

tenuous basis for implying a power which in order to exist must be affirmatively granted. Of far greater significance is the fact that a familiar clause—found in several of our treaties—which qualifies the exception of citizens by expressly conferring discretionary power to surrender them was omitted in the treaty with France.

The treaty with Japan of 1886 provided in Article VII [6]—

"Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so".

A similar provision is found in the extradition treaties with the Argentine Republic, of 1896, and with the Orange Free State, of 1896.[7] The treaties with Mexico, of 1899, with Guatemala, of 1903, with Nicaragua, of 1905, and with Uruguay, of 1905, expressly lodge the discretionary power with the "executive authority". Thus in the treaty with Mexico of 1899 we find the following article (Art. IV):

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so".[8]

We must assume that the representatives of the United States had these clauses before them when they negotiated the treaty with France and that the omission was deliberate. And the fact that our Government had favored extradition treaties without excepting citizens puts the omission of the qualifying grant of discretionary power in a strong light.

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[6] 1 Malloy, 1027. Quoted in Charlton *v.* Kelly, 229 U. S. 447, 467.

[7] The provision of the treaty with the Argentine Republic, 1896, Art. 3, 1 Malloy, 26, is as follows:

"In no case shall the nationality of the person accused be an impediment to his extradition, under the conditions stipulated by the present treaty, but neither Government shall be bound to deliver its own citizens for extradition under this convention; but either shall have the power to deliver them up, if in its discretion it be deemed proper to do so".

The same phraseology is used in the treaty with the Orange Free State, 1896, Art. V, 2 Malloy, 1316.

[8] 1 Malloy, 1186. The treaties with Guatemala, 1903, Art. V, 1 Malloy, 881, and with Nicaragua, 1905, 2 Malloy, 1295, have the same provision.

The treaty with Uruguay, 1905, Art. X, 2 Malloy, 1828, provides: "The obligation to grant extradition shall not in any case extend to the citizens of the two parties, but the executive authority of each shall have power to deliver them up, if, in its discretion, it is deemed proper to do so".

Historical background and administrative practice furnish no warrant for reading into the treaty with France a grant which the parties failed to insert. History and practice not only do not support, but they rather negative, the claim of an implied discretionary power. The language of Article V of the treaty with France first appears in our extradition treaty with Prussia in 1852,[9] and it was repeated in a number of later treaties including the Mexican treaty of 1861.[10] It seems that the question as to the effect of the provision first arose under the last-mentioned treaty. Mr. Moore reviews the cases.[11] In 1871 the United States requested the surrender of fugitives who had escaped to Mexico. It appeared that they were Mexican citizens. The Mexican Government refused surrender, stating that its action "should be in strict conformity with the stipulations of the treaty of extradition" and with "the practice observed" by the Government of the United States toward the Mexican Government "in similar cases". In 1874, one Perez, a Mexican, committed a murder in Texas and escaped to Mexico. Our Secretary of State, Mr. Fish, instructed the American Ambassador that although the surrender could not be demanded as of right and would not be asked as a favor, or even accepted with an understanding that it would be reciprocated, the circumstances might be made known to the Mexican Government with a view to ascertain whether it would voluntarily surrender the fugitive. The Mexican Government declined the surrender. In another case, arising in 1877, the question of the power of the Mexican Government to surrender its citizens to the United States came before its federal supreme court. While it appeared that the fact of Mexican citizenship was not conclusively established, the court was of the view that the individual guarantees of the Mexican Constitution would not be violated by the surrender.

The question was elaborately considered in the case of Trimble in 1884. He was an American citizen whose extradition was demanded by the Mexican Government. Our Government refused surrender. Mr. Frelinghuysen, Secretary of State, took the ground that as the treaty negatived the obligation to surrender, the President was not invested with legal authority to act. While it is true

[9] 2 Malloy, 1503.

[10] 1 Malloy, 1127.

[11] Moore on Extradition, vol. 1, pp. 164-167; Moore, Int. Law Dig., vol. IV, pp. 301-303.

that Secretary Frelinghuysen later concluded that the question was of such importance that it should receive judicial determination, the view he entertained as to the President's lack of power was cogently stated.[12] Referring to that view, Mr. Moore adds: "To this position the government of the United States has adhered".[13]

Secretary Bayard in the case of Hudson, in 1888, followed the ruling in the Trimble case. He said: "The treaty provision referred to, which is found similarly stated in many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the treaty in the *Trimble Case* is correct". See *Ex parte McCabe*, 4 Fed. 363, 379.

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[12] Mr. Frelinghuysen's views appear in a report to the Senate. Sen. Ex. Doc. 98, 48th Cong., 1st sess. See Moore on Extradition, vol. 1, pp. 167, 168. Discussing the constitutional powers of the President, Mr. Frelinghuysen concluded:

"Thus it appears that, by the opinions of several Attorneys-General, by the decisions of our courts, and by the rulings of the Department of State, the President has not, independent of treaty provision, the power of extraditing an American citizen; and the only question to be considered is whether the treaty with Mexico confers that power.

"By the treaty with Mexico proclaimed June 20, 1862, this country places itself under obligations to Mexico to surrender to justice persons accused of enumerated crimes committed within the jurisdiction of Mexico who shall be found within the territory of the United States; and further provides that that obligation shall not extend to the surrender of American citizens. The treaty confers upon the President no affirmative power to surrender an American citizen. The treaty between the United States and Mexico creates an obligation on the part of the respective governments, and does no more, and where the obligation ceases the power falls. It is true that treaties are the laws of the land, but a statute and a treaty are subject to different modes of construction. If a statute by the first section should say, The President of the United States shall surrender to any friendly power any person who has committed a crime against the laws of that power, but shall not be bound so to surrender American citizens, it might be argued, perhaps correctly, that the President had a discretion whether he would or would not surrender an American citizen. But a treaty is a contract, and must be so construed. It confers upon the President only the power to perform that contract. I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.

"Such being the construction of the treaty, and believing that the time to prevent a violation of the law of extradition was before the citizens left the jurisdiction of the United States, I telegraphed the Governor of Texas that an American citizen could not legally be held under the treaty for extradition.

"It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power".

[13] Moore on Extradition, vol I, p. 167.

Secretary Blaine, in 1891, in refusing to ask for the surrender of Mexican citizens, took the same position, saying: "In view of this", (the Trimble case) "and several prior and subsequent cases in which a similar construction has been given to the treaty, the government is precluded from demanding the extradition of the fugitives in the present instance". *Id.*

In this situation, the question of the construction of the treaty with Mexico came before the District Court of the United States for the Western District of Texas in 1891. Mrs. McCabe, an American citizen who was held for extradition proceedings on the charge that she had committed the crime of murder in Mexico, sued out a writ of *habeas corpus*. In an elaborate opinion reviewing the precedents, Judge Maxey ruled that there was no authority to surrender and directed her discharge from custody. *Ex parte McCabe, supra.* The case was not appealed.

In the light of this concurrence of administrative and judicial views a new extradition treaty with Mexico was negotiated (1899). That treaty, as we have seen, repeated the exception with respect to citizens but, following the precedent of the treaties with Japan, the Argentine Republic and the Orange Free State,[14] added the qualifying words "but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so". And the same qualification was inserted in the later treaties above mentioned.[15]

Petitioners insist that the precedents fall short of showing a uniform course of practical construction favorable to the respondents. The argument is unavailing. What is more to the point is that administrative practice is not shown to be favorable to the petitioners. Strictly the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied. The administrative rulings to which we have referred make the latter conclusion wholly inadmissible.

The treaty with France of 1843 made no exception of citizens. France, however, refused to recognize an obligation under that treaty to surrender her citizens.[16] In inserting the exception in the new treaty, a clause was chosen under which Secretaries of

[14] See Note 7.
[15] See Note 8.
[16] Moore, Int. Law Dig., vol. IV, p. 298.

State and a federal court had held that the President had no discretionary power to surrender citizens of this country. Notwithstanding this, that excepting clause was inserted without qualification, and a familiar clause granting a discretionary power was omitted. No provision was inserted to confer such a power. It was upon that basis that the treaty was negotiated and ratified. In these circumstances we know of no rule of construction which would permit us to supply the omission.

Against these considerations, the inference sought to be drawn from the French "exposé des motifs" accompanying the treaty, and more particularly from the "exposé" accompanying the Franco-British treaty of 1908, is of slight weight.[17]

Petitioners strongly rely upon the decision in England in *In re Galwey* [1896], 1 Q. B. D. 230; compare *Reg.* v. *Wilson*, 3 Q. B. D. 42 (1877). But, as the Circuit Court of Appeals points out, the Anglo-Belgian treaty there under consideration had its own history and background—quite different from that which we have here—upon which the case turned. It does not present a persuasive analogy.

Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.

However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens, and not with the courts.

The decree of the Circuit Court of Appeals is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391; *Id.*, Sénat, Annexe 2338.